91-1535

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL ADVERTISING COMPANY,
Petitioner,
vs.
CITY OF RALEIGH, NORTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can an ordinance regulating land use be "ripe" for judicial review immediately upon enactment (as the courts below held) when the ordinance makes no immediate change in the way in which the property may be used and its actual impact will not be felt until 5 1/2 years in the future?

2. Can an "as applied" challenge to an ordinance regulating land use be made (as the courts below held) *before* the ordinance has been applied in a concrete way which causes actual damage?

3. Can unconstitutional conduct be shielded from judicial review by a statute of limitations? If so, can it be (as the Court of Appeals held below) that violation of one provision of the Bill of Rights (the First Amendment) can never be validated by the passage of time, while violation of another (the Taking Clause of the Fifth Amendment) becomes immunized if not immediately challenged?

4. Is the statute of limitations to seek redress directly under the Constitution for violation of the Fifth Amendment's Taking Clause the same as the time to seek redress under 42 U.S.C. §1983?

PARTIES TO THE PROCEEDING

The parties are listed in the caption.

RULE 29.1 STATEMENT

National Advertising Company is a wholly owned subsidiary of Minnesota Mining and Manufacturing Corporation.

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In The
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NATIONAL ADVERTISING COMPANY,
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vs.
CITY OF RALEIGH, NORTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner National Advertising Company (National) respectfully prays that a Writ of Certiorari issue to review a judgment and order of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Court of Appeals issued its opinion on Oct. 25, 1991, and published it as *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991). (App. A) Petitioner's timely Petition for Rehearing and Suggestion of the Appropriateness of Rehearing in Banc was denied Dec. 31, 1991. (App. B) The District Court's order granting summary judgment and the ensuing judgment are unpublished. (App. C)

JURISDICTION

This case involves an ordinance establishing a regulatory taking of outdoor advertising structures without any pretense of compensation (by the expedient of delaying the time of taking and calling that delay an "amortization" period before the taking occurs).

The Raleigh, North Carolina ordinance in question (App. D), adopted in October 1983, required billboards to be reduced to such a size that they would be useless. In other words, the "size reduction" was equivalent to an outright ban. But the ban was not immediately in effect. **Nothing** was required to be done to any of National's billboards until April 1989 — 5 1/2 years later.[1]

In early 1989, Raleigh informed National that all 36 of its signs in the city would have to be removed by April 1989. At that point, when the dispute between Raleigh and National had become concrete and National was directly threatened with injury, National filed suit to have the ordinance declared unconstitutional as applied to National's billboards.

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[1] Although the summary judgment on timeliness prevented litigation of the merits of the lawsuit, evidence in opposition to the motion for summary judgment showed that forced removal of National's billboards would deprive National of economically viable use of its property. The billboards cannot be relocated economically. The leaseholds on which the structures are located have no use other than as billboard locations. Each billboard has a substantial remaining useful life, is providing income to National, and has a substantial fair market value. National expected to continue using its billboards for the remainder of the billboards' useful lives. As a result, enforcement of the ordinance interferes with National's reasonable, investment-backed, profit expectations.

Raleigh has never offered to compensate National for the taking of its billboards.

National sought the assistance of the District Court (pursuant to 28 U.S.C. §§1331, 1343) because of the unconstitutionality of this action, which took its property without just compensation (in violation of the Fifth and Fourteenth Amendments) and interfered with protected speech (in violation of the First Amendment), and because of the inability of state law to provide relief.

However, the District Court never reached the substantive issues, *granting summary judgment on the ground that the statute of limitations began to run the moment the ordinance was enacted.* The District Court granted summary judgment to the City on the theory that suit ought to have been filed within 3 years of *adoption* of the 1983 ordinance, even though no injury was threatened to National until 1989 — 5 1/2 years after the ordinance's adoption. The District Court's summary judgment in favor of the City was entered April 27, 1990. (App. C)

The Court of Appeals' judgment affirming the District Court was filed October 25, 1991. (App. A) The timely Petition for Rehearing was denied Dec. 31, 1991. (App. B)

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND ORDINANCE PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

The Raleigh ordinance is reproduced in App. D.

STATEMENT OF THE CASE

National owns 36 advertising billboards within Raleigh's zoning jurisdiction.[2] Each billboard was lawfully erected, had permits under then-existing zoning and building regulations, and has been in place for more than 10 years.

National leases land, builds and maintains outdoor advertising signs on the leased land, and then leases those signs to others for display advertising. National's billboards are used by local and national businesses, as well as non-commercial advertisers such as the Red Cross, the March of Dimes, the League of Women Voters, and various government agencies.

In October 1983, Raleigh adopted an ordinance banning off-premise billboards in most of the City. (App. D) On its face, the ordinance provided that no billboard would have to be dismantled until April 1989.

Nothing happened between the adoption of the ordinance in October 1983 and January 1989. On January 6, 1989, the City sent a letter to National demanding that all 36 of National's billboards, including the 16 on federal aid primary highways, be removed by

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[2] 16 of National's billboards are located on federal aid primary highways. This is important, because Federal law conditions the elimination of billboards on federal aid primary highways on the payment of just compensation. (23 U.S.C. §131)

April 23, 1989. This suit challenging the constitutionality of Raleigh's attempt to enforce the ordinance was filed April 28, 1989.

It was not until December 1989 — nearly a year after its demand for removal of *all* 36 of National's signs — that Raleigh said it would require removal only of the 20 signs not located on federal aid primary highways. This was the first time the city told National of any change in its enforcement plan.

Raleigh's change in enforcement plans during 1989 shows that, as of at least early 1989 — more than 5 years after the ordinance was adopted — even the city was unsure how application of the ordinance would affect National.

On April 23, 1989, the date on which the ordinance required removal of billboards, Raleigh enacted a penalty ordinance, imposing major fines for violation of the billboard ordinance. In deposition, Raleigh's zoning inspector supervisor testified that there was no specific penalty for violating the ordinance before April 23, 1989. Additionally, the city official in charge of enforcing the ordinance testified that Raleigh's January 1989 letter to National was the first step toward enforcement of the ordinance, and that the letter was the first effort even to inform National of which billboards Raleigh required to be removed.

Because this is, in part, a civil rights action under 42 U.S.C. §1983, the limitation period was held to be North Carolina's 3 year statutory period.[3]

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[3] The Court of Appeals concluded that the District Court had used the wrong state statute, but the correct time period was the same. (App. A, p. 4)

The parties disagreed on the date from which the 3 years began to run. Raleigh wanted to avoid litigation of the merits of its action by beginning the running of the statute on the 1983 effective date of the ordinance. National believed that the statute of limitations did not begin until the ordinance was applied to National in 1989, thus "ripening" the dispute for litigation.

The District Court held that the 3-year statute of limitations began to run immediately after enactment of the ordinance. (App. C, p. 7)

The Court of Appeals agreed, but only in part. Accepting the District Court's conclusion that the **Fifth** Amendment takings claim was barred by the passage of time (App. A, p. 13), the Court of Appeals held that the **First** Amendment claim *could not* be time-barred because the passage of time could not legitimize that constitutional violation. (App. A, p. 16) When the internal contradiction in these holdings was called to the Court of Appeals' attention, that Court refused to grant a rehearing to eliminate the confused holding.

After the Court of Appeals filed its opinion, the 9th Circuit Court of Appeals filed its opinion in *Azul Pacifico v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991), which held that the statute of limitations for a takings claim brought directly under the Fifth Amendment was different from that applied to actions under 42 U.S.C. §1983. The court below refused to grant rehearing to consider this new development, thus deliberately creating a conflict with the 9th Circuit.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The "ripeness" doctrine in regulatory taking cases has generally been used by government agencies to argue, and courts to hold, that a property owner's suit is premature and filed *too soon*. Thus, as a rule, the property owner is the one urging that his or her dispute with government is sufficiently concrete that litigation may take place.[4]

This case presents the other side of the coin. Here, the property owner did what this Court has, for years, told property owners they must do: wait until concrete injury is done. The result? The courts below held that the complaint was filed *too late*. Contrary to all known authority, the courts below held that sufficient concrete injury was done *by the mere adoption of the ordinance* that suit had to be filed immediately.

The confusion in what it takes to "ripen" a land use controversy for decision merits this Court's attention. Clarification by this Court could eliminate much needless litigation and restrict litigation to the merits, rather than needless procedural gavottes which swell the reports with decisions adding perplexing embroidery to the law of "ripeness" and limitations.

During the last decade, this Court has clearly held that it is necessary to determine with substantial precision the actual, concrete harm suffered by a property owner before there is a controversy "ripe" for adjudication. (*MacDonald, Sommer & Frates v. County of Yolo*, 477

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[4] Illustrative is the situation in the Petition for Writ of Certiorari now pending in *Long Beach Equities, Inc. v. County of Ventura*, no. 91-1076.

U.S. 340, 348 [1986]; *Williamson County Reg. Planning Commn. v. Hamilton Bank*, 473 U.S. 172, 190-191 [1985].) Indeed, commentators have expressed the view that this Court appears deliberately to have made it difficult to "ripen" a regulatory taking case, to make certain that a concrete dispute about the actual application of a regulation is presented to the courts. (Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zoning & Planning Law Report 49 [July-Aug. 1988]; Mandelker, Gerard & Sullivan, *Federal Land Use Law*, §4A.02 [1986, supp. 1990].)

However, notwithstanding this Court's repeated holdings that regulatory challenges must await specific application and harm to specific property (*Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264, 293-297 [1981]; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 494-495 [1987]; *Pennell v. City of San Jose*, 485 U.S. 1, 10 [1988]), the courts below held that a land use regulation was *ripe for challenge immediately upon adoption*.

Petitioner believes the decisions below are so clearly contrary to the decisions of this Court cited above that summary reversal would be appropriate. (*Compare, e.g., Mason v. City of Biloxi*, 385 U.S. 370 [1966]; *Johnson v. Virginia*, 373 U.S. 61 [1963].) If not, then certiorari is warranted by the potential havoc to be wreaked in garden variety zoning cases by the holding below that suit **must** be filed immediately upon passage of the ordinance, on pain of being barred from later litigation.[5]

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[5] Even were this problem limited to billboard amortization ordinances, the rapidly proliferating number of such ordinances would warrant certiorari to ensure certainty in the applicable rules.

I.

THERE IS HOPELESS CONFUSION THROUGHOUT THE COUNTRY ON WHAT IT TAKES TO "RIPEN" A REGULATORY TAKING CASE FOR LITIGATION ON THE MERITS

"Ripeness" in land use litigation does not seem to be a concept whose full ramifications have been cohesively considered by this Court. Rather, in the course of not deciding the compensation issue in cases which preceded *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) during the 1980s, this Court concluded that the facts of the cases before it were, for one reason or another, not sufficiently well-developed to form the basis for answering the constitutional question.

Two commentators recently surveyed the land use field and concluded that there is little rhyme or reason to the application of this Court's "ripeness" decisions by lower federal courts. Not only did they find differences from one court to another, they found inconsistent results even within the single Court of Appeals which has treated the issue most often. That sort of confusing result cries out for this Court's intervention:

> "The 'finality' requirement has been the *most troublesome* for the lower federal courts *to apply*. Some judges have openly admitted their *difficulty* in determining 'when enough is enough' under this requirement. [Citations.]
>
> "The Court of Appeals for the Ninth Circuit has had the most

> opportunities to refine this first prong of the ripeness doctrine. But its *decisions have not yet yielded any predictable approach* for plaintiff property owners." (Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zoning & Planning Law Report 49, 53 [July-Aug. 1988]; emphasis added.)

The reality of the confusion spawned by the ripeness "rules" is that the odds overwhelmingly favor the government. As one government lawyer candidly expressed it, "[l]ike the vagueness of the three-factor analysis [for determining what is a taking], this [ripeness] requirement has historically worked to the advantage of government regulators." (Lawrence, *Regulatory Takings: Beyond the Balancing Test*, 20 The Urban Lawyer 389, 400 fn. 71 [1988]) The playing field needs to be levelled in order to satisfy the Fifth Amendment protection guaranteed property owners.

A. This Case Further Muddies the "Ripeness" Waters by Holding that Damage Occurs *Upon Enactment* of a Land Use Regulation

This Court has repeatedly sought to restrict the types of municipal actions which will give rise to constitutional taking claims. Thus, the Court has held that mere diminution in market value will not establish a taking. (*Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 131 [1978]) The Court has also held that ". . . even substantial reduction of the attractiveness of the property to potential purchasers . . ." will not establish a taking. (*Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 15 [1984])

The opinion below proceeds in utter defiance of these two clear holdings of this Court by making these two indicia, *i.e.*, a presumed diminution in market value and a presumed reduction in the attractiveness of the property to a potential purchaser, the focus of its analysis. (App. A, p. 8)

Moreover, while conceding that it has been unable to devise any formula for determining when a taking occurs, and concluding that each case must be decided on an "ad hoc" examination of its own facts (*e.g., Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978]; *Kaiser Aetna v. U.S.*, 444 U.S. 164, 175 [1979]; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 [1984]), this Court has also said that, before a taking can be found, the governmental action *must* have deprived the owner of *all economically viable use* of the property (*e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 [1980]; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 [1987]).

The Court of Appeals' damage analysis clearly does not posit an immediate deprivation of all economically viable use. (App. A, p. 8) In sharp conflict, the opinion is premised on the thought that, on the day the ordinance was enacted, an appraiser could have viewed the situation and proclaimed that some lesser injury had been done to National. (App. A, p. 8)

The Court of Appeals' analysis is contrary to numerous cases from this Court and other Courts of Appeals which uniformly forbid that sort of speculative "valuation."

As long ago as *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), this Court refused to accept allegations of value loss by property owners resulting from the mere enactment of a zoning ordinance restricting the use of

the plaintiffs' land, relegating them to a later challenge, as applied, when the ordinance actually caused damage.

In *Agins v. City of Tiburon*, 447 U.S. 255, 258 (1980), the property owners asserted that a rezoning of their land completely destroyed its value. This Court, of course, held that claim to be premature.

In *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872 (9th Cir. 1987), the property owners urged that a new general plan had left them with no economically viable uses. The case was held unripe.

The point is that, from the property owner's perspective, it is not difficult to visualize substantial adverse economic impact upon the adoption of new regulations. In many cases, competent professional appraisers would willingly testify that the "market" immediately reacts to such events. Nonetheless, the nearly uniform judicial reaction to date has been to refuse to evaluate such claims. This Court and most lower courts have concluded that such evaluation must await actual application and concrete injury.

The opinion below conflicts with that settled methodology. Thus, to determine the economic impact on National's property on the day Raleigh adopted its ordinance, an appraiser would have been required to make numerous determinations about what National's business structure would look like 5 1/2 years in the future.[6] Among other things, the hypothetical appraiser would have to decide at least the following: (1) whether National would still be in the outdoor advertising business 5 1/2 years in the future; (2) the scope of National's

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[6] If someone could make such predictions, one might legitimately inquire why he was working as an appraiser instead of investing in the stock market, or more particularly, in the "futures" market, where such talent could be put to far more lucrative use.

business 5 1/2 years hence; (3) the type of contracts National would use in 5 1/2 years; (4) the market for outdoor advertising in 5 1/2 years — in Raleigh and elsewhere; (5) the potential uses for the land on which National's signs are located in 5 1/2 years; and (6) the salvage value of signs in 5 1/2 years (a computation which would have to include further speculation on the nature of the rest of National's business to be able to know what use National would then be able to make of the signs being dismantled and removed from Raleigh). Additionally, the appraiser would have to be able to predict whether the city would change its corporate mind because of the following: (7) change in the composition of the city council; (8) change in the economy producing a need (or, at least, a municipal desire) for a different result; and (9) a determination of whether to exempt the federal aid highway signs. The latter actually occurred here. In early 1989, Raleigh demanded removal of *all* of National's signs. At the end of 1989, however, the city changed its mind and excluded the federal aid highway signs from its demand.

The nature of these inquiries demonstrates the wisdom of the long line of cases holding that challenges to municipal ordinances as takings are not ripe until the damage *actually occurs*. (*E.g., Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264, 293-297 [1981]; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 494-495 [1987]; *Pennell v. City of San Jose*, 485 U.S. 1, 10 [1988])

Evaluation *after* the "amortization" period ends, when it can be said with certainty *that* the signs will have to be dismantled and *which* signs will have to be dismantled, is relatively easy. It is the kind of task appraisers do routinely. It requires no speculation. By contrast, the

methodology mandated by the opinion below is rife with guesswork and hypothesizing.

B. This Case Creates an Impossible Hurdle by Holding that Suit Must be Filed Even BEFORE a Cause of Action Exists

A key inquiry in a regulatory taking case is determining when in the relationship between government and property owner the impact on the property owner became so severe that it became a taking and a cause of action thus accrued. Current case law teaches that regulatory taking cases are not treated like rear end collision cases in determining the accrual of the cause of action. Unlike a collision case, there is no precise *punctum temporis* in the history of the property owner's relationship with the regulators at which the cause of action automatically arises. Rather, as this Court put it, a court faced with a taking case is required to:

> ". . . resolve the difficult problem of how to define 'too far,' that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." (*Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172, 199 [1985])

By definition, statutes of limitations are tied to causes of action; they do not exist in a vacuum. A statute of limitations does not begin to run until a cause of action accrues. As the most general of texts puts it:

> ". . . time begins to run under such statutes [of limitations] when, and only when, the cause or right of action has accrued or arisen. . . . [T]he statute of limitations begins to run immediately upon the accrual of the cause of action." (51 *Am.Jur.2d*, Limitation of Actions §107 at 679)

Thus, to conclude that the statute of limitations ran at bench, it was incumbent on the courts below to determine when a cause of action for a Fifth Amendment taking accrued in favor of National Advertising. But the opinion below repeatedly acknowledges that it does not decide whether a taking occurred when Raleigh enacted its ordinance. (App. A, pp. 6, fn. 3, 8)[7] And then the opinion goes on to conclude that the statute of limitations has already run. The problem with that analysis is that the point in the process at which the regulatory impact became so severe that a taking occurred must be located to determine when (if ever) a cause of action accrued and the statute of limitations was thus triggered.

In virtually all previous cases, the property owner has been required to await further action by the government or take further action himself before filing suit to test the constitutionality of the regulation. Even in those cases where *facial* challenges to the regulations are decided (*e.g., Keystone*), challenges to the effects of the regulation *as applied* are relegated to later litigation. In *Keystone*, for example, although this Court entertained the facial challenge, it noted that an as applied challenge

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[7] ". . . we **do not reach** here the question of whether a taking actually occurred . . . ." (App. A, p. 6, fn. 3; emphasis added.) ". . . the injury suffered by National **might or might not** rise to the level of a taking . . . ." (App. A, p. 8; emphasis added.)

was *still* not ripe — *16 years after the statute's adoption.*

Until it has been determined that a cause of action existed upon the enactment of the Raleigh ordinance, it is impossible to conclude that the statute of limitations to suc *on that cause of action* has run.

C. This Case Sets the Stage For — Indeed, Compels — a Vast Increase in the Number of Routine Zoning and Land Use Cases Which are "Ripe" for *Immediate* Litigation

By holding that a cause of action for a Fifth Amendment taking accrues immediately upon the passage of an ordinance when an appraiser is able to hypothesize that the property is immediately worth less or is less interesting to a potential purchaser (App. A, p. 8), the opinion below has opened a gate which this and all other federal courts have endeavored to keep shut.

Contrary to virtually every federal land use/takings decision since *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which have refused to permit property owners to sue municipal regulators immediately after the adoption of restrictive ordinances no matter how much the owners may believe they have been injured, the opinion below holds that an appraiser could hypothesize damage and therefore damage actually occurred and therefore the statute of limitations began to run.

With respect, the kind of "instantaneous damage" analysis in the opinion below (App. A, pp. 7-8) could be done in any routine zoning case, not to mention more complex regulatory schemes. Indeed, it is commonplace for property owners whose land is rezoned to a more

restrictive designation to charge that the rezoning has diminished the value of their property. Any of them could claim, with some degree of accuracy, that the down-zoned property is less attractive to potential purchasers. (App. A, p. 8) It is as likely that they could engage appraisers to testify to those facts of "market" life as it is for the appraisers hypothesized in the opinion below.

That's a two-edged sword. Not only does it *permit* such down-zoned property owners to file suit immediately, it *requires* them to. Failure to sue immediately would result (as it did for National Advertising at bench) in dismissal of their case if they wait for later developments to determine the actual impact of the downzoning.

II.

EITHER THE VIOLATION OF CONSTITUTIONAL RIGHTS IS SUBJECT TO STATUTES OF LIMITATIONS OR IT IS NOT. THE COURT BELOW HELD IT IS BOTH — DEPENDING ON THE RIGHT WHICH WAS VIOLATED

If — as the opinion below holds — the **First** Amendment challenge was not barred by the statute of limitations, then the **Fifth** Amendment challenge wasn't either.

The opinion below has a strange dual personality:

- For most of its length, it agonizes over how the statute of limitations applies to National's **Fifth** Amendment challenge to Raleigh's billboard

ordinance. (App. A, pp. 5-16) The opinion finally concludes its lengthy analysis by holding that the **Fifth** Amendment challenge was time-barred.

- Then (App. A, p. 16), the opinion turns to the **First** Amendment issues (which the District Court held to be just as time-barred as the Fifth Amendment issues and thus did *not* decide on their merits) and held, without any of the agonizing analysis applied to the **Fifth** Amendment issues, that the **First** Amendment issues *could not* be time-barred.

Why? The reason is simplicity itself: "Because it is doubtful that an ordinance facially offensive to the First Amendment can be insulated from challenge by a statutory limitations period . . . ." (App. A, p. 16)

National agrees with the proposition that ordinances which are offensive to the Constitution cannot be saved by statutes of limitations. That is the clear message of such cases as *Brown v. Board of Education*, 347 U.S. 483 (1954); *Virginia Hosp. Assn. v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989), *aff'd sub nom. Wilder v. Virginia Hosp. Assn.*, 496 U.S. ___, 110 L.Ed.2d 455 (1990); *cf. Cabazon Band of Mission Indians v. City of Indio*, 694 F.2d 634 (9th Cir. 1982) [violation of statutory authorization renders ordinance void].

While in no way disparaging the importance of the First Amendment, the Fifth Amendment protection of the rights of private property owners was linked by the constitutional draftsmen with the ultimate rights to life and liberty. Surely, the rights to life, liberty and property guaranteed by the Fifth Amendment occupy no

lower rung in the pantheon than those protected by the First.

The opinion below conflicts with itself, as well as the decisions noted above, in holding that one type of Constitutional challenge is timely while another is barred. Under the opinion's **First** Amendment reasoning, the **Fifth** Amendment issues need to be remanded for trial.

III.

THERE IS CONFLICT ABOUT THE PROPER STATUTE OF LIMITATIONS TO APPLY TO A CAUSE OF ACTION UNDER THE FIFTH AMENDMENT

The Court of Appeals' opinion disposes of this case as though the statute of limitations applied under the Civil Rights Act (42 U.S.C. §1983) governs all aspects of this litigation. But, as the complaint shows, National Advertising also sought relief for a taking of its property directly under the Fifth Amendment to the Constitution.

An opinion of the 9th Circuit Court of Appeals, rendered after the filing of the opinion below, holds that a different limitations period applies for the inverse condemnation action brought directly under the Constitution than for the §1983 action seeking compensation for a taking. The opinion at bench and the 9th Circuit opinion cannot both be correct. Either the statutes of limitations are the same or they are different. To avoid continuing confusion, this Court needs to end the dispute.

In *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991), the Court held that a property

owner's §1983 action was time-barred. (948 F.2d at 586)[8] Then, turning its attention to the Constitutional Fifth Amendment cause of action, the Court concluded that a different statute of limitations had to be applied, rendering that cause of action timely. (948 F.2d at 587)

The 9th Circuit's opinion in *Azul Pacifico* holds that either the state statute of limitations for inverse condemnation or the federal statute of limitations for inverse condemnation applied by the Claims Court must be applied to the takings issue. In that case, the Court found it unnecessary to decide which of these two standards applied because under either the state inverse condemnation statute (5 years) or the federal Claims Court statute (6 years), the action was timely.

National believes that, under North Carolina law, the statute of limitations generally relied on for inverse condemnations is G.S.N.C. §1-40, the 20 year period for adverse possession. (*E.g., Holye v. Charlotte*, 172 S.E.2d 1 [1970]; *Love v. Postal Telegraph-Cable Co.*, 20 S.E.2d 337 [1942].) In reply to National's Petition for Rehearing below, Raleigh suggested that the 2-year period under G.S.N.C. §40A-51 was appropriate. Even in that event, the action was timely, as the 2 years runs from ". . . the date of the taking of the affected property *or the completion of the project involving the taking*,

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[8] The ordinance in *Azul Pacifico*, unlike the ordinance at bench, had a clear and immediate impact on the property owners. It was a rent control ordinance which was effective on passage, was held to be a physical taking of property, and immediately altered the legal relationships between landlord and tenants. That is why, in that specific context, the cause of action properly arose immediately upon enactment of the ordinance. That enactment caused an immediate physical invasion of the property, in contrast to the case at bench, where any physical impact was delayed 5 1/2 years from enactment of the ordinance.

whichever shall occur later." (Emphasis added.) Here, no matter how one analyzes it, the "completion" of this project (*i.e.*, alteration or removal of outdoor advertising structures) could not happen until at least 5 1/2 years after adoption of the ordinance, when the "amortization" period would end. Under North Carolina's statutory limitation scheme, this action was timely.

Azul Pacifico was filed after the opinion below. It was brought to the Court of Appeals' attention in National's Petition for Rehearing. Denial of rehearing was a deliberate act by the court below to create conflict of decision with the 9th Circuit. That conflict merits resolution. Both answers cannot be right.

CONCLUSION

The question of when a property owner should (or must) file suit to challenge the impact of a municipal regulation has been in a state of constant flux at least since this Court's decision more than a decade ago in *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

It is appropriate at this time for this Court to provide some unified guidance to lower courts and all participants in the land use process, by explaining when it is necessary for a property owner to sue and when it is necessary for that property owner to await further developments.

The present system is chaotic. When a property owner sues soon after an ordinance is enacted, it is a knee-jerk governmental response to move to dismiss because the case is not yet "ripe." When a property owner waits until it appears that the claim has "ripened," as happened here, the government then claims that suit was too late and is time-barred. Indeed, so confused is

the law, and so ubiquitous the timeliness challenges, that it is not unusual for a property owner to find his or her action challenged as being **simultaneously** unripe (too early) and time-barred (too late).

National Advertising Company prays that this Court's writ issue so that rationality can be brought to this area of the law and the time of courts and litigants can be spent evaluating the merits of their cases rather than counting further angels on the Janus-faced pinheads of timeliness and ripeness.

Dated: March 25, 1992.

Respectfully submitted,

MICHAEL M. BERGER
Counsel of Record

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Attorneys for Petitioner
NATIONAL ADVERTISING COMPANY

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NATIONAL ADVERTISING COMPANY,
Plaintiff-Appellant,

v.

CITY OF RALEIGH, North Carolina,
Defendant-Appellee.
SOUTHERN ENVIRONMENTAL LAW CENTER,
Amicus Curiae.

No. 90-3086

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, District Judge.
(CA-89-332-CIV-5-B)

Argued: January 8, 1991

Decided: October 25, 1991

Before RUSSELL and WILKINS, Circuit Judges, and ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Ellis wrote the opinion, in which Judge Russell and Judge Wilkins joined.

COUNSEL

ARGUED: Michael M. Berger, FADEM, BERGER, NORTON, Los Angeles, California, for Appellant. Thomas A. McCormick, CITY OF

RALEIGH, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Katherine E. Slaughter, SOUTHERN ENVIRONMENTAL LAW CENTER, Charlottesville, Virginia, for Amicus Curiae.

OPINION

ELLIS, District Judge:

Appellant National Advertising Company commenced this action in April 1989 under 42 U.S.C. § 1983 alleging that a 1983 ordinance adopted by the City of Raleigh, North Carolina, restricting off-premise outdoor advertising signs, violated the First and Fourteenth Amendments and also resulted in a taking without just compensation in violation of the Fifth and Fourteenth Amendments. The district court found that National's suit was barred by North Carolina's three-year limitations period set forth in G.S.N.C. § 1-52(2). On appeal, National contends that it suffered no injury from the ordinance, and hence no cause of action accrued, until a five-and-one-half (5 1/2) year grace period provided in the ordinance for nonconforming signs expired. National also contends that its action is timely because the ordinance constitutes a "continuing" constitutional violation. The district court rejected National's contentions. Finding no error below, we affirm.

I.

On October 18, 1983, the Raleigh city council adopted Ordinance No. 210 TC 198 ("the 1983 ordinance" or "the ordinance"), which by its terms became effective October 23, 1983.[1] This ordinance amended a 1979 ordinance that established zoning regulations for signs in Raleigh. The 1979 ordinance allowed "on-premise" signs, defined as signs located on the premises which "direct[] attention to a business, profession, commodity, service, or entertainment conducted, offered, sold, manufactured, or provided at a location on the

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[1]A detailed description of this ordinance appears in this Court's opinion in *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269, 1270-72 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987).

premises where the sign is located or to which it is affixed," and permitted "off-premise" signs (or "non-point-of-sale" signs) and special category signs, including political signs, real estate signs and governmental and public purpose signs, in certain areas of Raleigh.

The 1983 ordinance modified the 1979 ordinance, *inter alia*, by reducing the size of permissible off-premise signs from 672 square feet to 150 square feet for signs facing streets with four or more traffic lanes, and to 75 square feet for signs facing streets with fewer than four traffic lanes. A further modification confined the location of such signs to so-called "industrial zones" as defined in the ordinance. Existing signs larger than the specified dimensions were declared nonconforming uses. Furthermore, the 1983 ordinance prohibited the construction of any new nonconforming signs and, except for ordinary maintenance and poster panel replacements, it also barred any structural alteration, reconstruction, or other material change to existing nonconforming signs unless the signs and their entire structures were brought into conformity with the 1983 ordinance. But existing nonconforming signs were not immediately banned. Rather, they enjoyed a 5 1/2 year grace period beginning October 23, 1983. At the end of this period nonconforming signs were required to be removed, unless they fell within a state law exception for signs located adjacent to highways on the National System of Interstate and Defense Highways or on the Federal-Aid Primary Highway system. The 5 1/2 year grace period (referred to in the ordinance as an "amortization" period) was in lieu of any other form of compensation.

National, a national advertising company, owns approximately thirty-six billboards in Raleigh. Sixteen of these billboards are located on federal highway systems and hence are exempted from the 1983 ordinance. National filed its complaint on April 28, 1989, more than three years after adoption of the 1983 ordinance and approximately one-month after expiration of the 5 1/2 year amortization period. Raleigh responded with a motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P., contending that the action was barred either by G.S.N.C. § 1-54.1, which establishes a nine-month limitation period for "actions contesting the validity of any zoning ordinance or amendment thereto," or by G.S.N.C. § 1-52(2), which establishes a three-year limitations period for lawsuits based on "liability created by statute, either state or federal." The district court determined that

the latter statute applied and barred National's suit. On appeal, National concedes that § 1-52(2) establishes the applicable limitations period. It contends, however, that it was not injured by the 1983 ordinance until the 5 1/2 year amortization period for nonconforming signs expired and it was forced to remove its signs or contest the validity of the ordinance. Accordingly, National argues that the district court erred in finding that the cause of action accrued upon enactment of the ordinance in October 1983. Instead, National contends the cause of action did not accrue until either the expiration of the amortization period or, at the earliest, January 6, 1989, the date it received a notification letter from Raleigh demanding the removal of its nonconforming billboards by April 1989. Alternatively, National claims that the 1983 ordinance created a continuing constitutional violation and therefore National's action is timely. We review these claims *seriatim*.

II.

Because there is no federal statute of limitations applicable to suits under § 1983, "it is the rule that the applicable 'provision limiting the time in which an action [under § 1983] must be brought, must be borrowed from the analogous state statute of limitations.'" *Bireline v. Seagondollar*, 567 F.2d 260, 262 (4th Cir. 1977), quoting *Cox v. Stanton*, 529 F.2d 47, 49 (4th Cir. 1975). The parties take the view that the analogous state limitations period is the three-year limitations period established in G.S.N.C. § 1-52(2) for actions based on "liability created by statute, either state or federal." While we agree that a three-year limitations period is applicable, we find that this limitations period is supplied by G.S.N.C. § 1-52(5), relating to personal injury actions, and not § 1-52(2).[2]

[2]In concluding that G.S.N.C. § 1-52(2) provides the applicable limitations period, the parties rely on past decisions of this Court. *See Bireline*, 567 F.2d at 263 (holding that § 1-52(2) is the most analogous limitations period for § 1983 actions); *Cox*, 529 F.2d at 49 (same). More recently, however, the Supreme Court held that the analogous state statute of limitations most appropriate for § 1983 actions is the limitation period for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261 (1985). In 1989, the Supreme Court further refined *Wilson* by holding that

The selection of the appropriate statutory limitations period is only the first step in the analysis. There remains the question of when National's cause of action accrued. While the statutory limitations period for § 1983 actions is borrowed from state law, "[t]he time of accrual of a civil rights action is a question of federal law." *Id.* at 50; *Campbell v. Haverhill*, 155 U.S. 610 (1895); *Bridgford v. United States*, 550 F.2d 978, 981 (4th Cir. 1977). "Federal law holds that the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action." *Cox*, 529 F.2d at 50; *see Urie v. Thompson*, 337 U.S. 163, 170 (1949) ("statutes of limitations . . . conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights"); *Blanck v. McKeen*, 707 F.2d 817, 819 (4th Cir.), *cert. denied*, 464 U.S. 916 (1983); *Young v. Clinchfield Railroad Co.*, 288 F.2d 499, 503 (4th Cir. 1961).

The basis of a takings claim is the assertion that a regulation's "interference with appellants' property is of such magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 136 (1978), quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). In determining whether a taking has occurred, courts examine several factors, including "the economic impact of the regu-

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where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions.

Owens v. Okure, _ U.S. _, 109 S. Ct. 573, 582 (1989) (holding that New York's three-year residual statute of limitations for personal injury claims not embraced by specific statutes, rather than one-year statute of limitations for intentional torts, governed § 1983 action). Thus, as courts since *Wilson* have recognized, the three-year period for personal injury actions set forth in § 1-52(5) is the North Carolina limitations period applicable to § 1983 actions. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989); *Reagan v. Hampton*, 700 F. Supp. 850 (M.D.N.C. 1988); *Reed v. United Transp. Union*, 633 F. Supp. 1516, 1525 (W.D.N.C. 1986); *see also Keller v. Prince George's County*, 827 F.2d 952, 955 n.2, 965 (4th Cir. 1987) (recognizing that *Wilson v. Garcia* requires all § 1983 actions to be characterized as personal injury tort actions for statute of limitations purposes).

lation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. Courts conducting a takings analysis in the zoning context "have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner's 'primary expectation concerning the use of the parcel.'" *Esposito v. South Carolina Coastal Council*, _ F.2d _, No. 89-1840, slip op. at 9 (4th Cir. July 3, 1991),[3] quoting *Penn Central*, 438 U.S. at 136. Interference with the primary uses of a property is the touchstone of the analysis. In the zoning context, "diminution in property value, standing alone, [cannot] establish a 'taking'. . . . [T]he 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." *Penn Central*, 438 U.S. at 131. The same principle applies in the present case. Hence, National's cause of action arose when the ordinance was enacted because it was then, if at all, that

[3]In *Esposito*, this Court concluded that a South Carolina statute effected no taking where it merely restricted the location for the rebuilding of beach cottages destroyed by natural causes or fire. Slip op. at 9-10. Although the result reached in Esposito differs somewhat from that reached here, particularly as we do not reach here the question of whether a taking actually occurred, the reasoning of the two decisions is consistent. The *Esposito* panel concluded that because appellants could continue to use their homes indefinitely and were "diminished only in their discretion to rebuild a structure in the speculative event of its virtually complete destruction," slip op. at 10, any current diminution in appellants' property values was not so great as to constitute a taking. There was no showing "that the regulation in question was 'so onerous that it [had] the same effect as an appropriation of the property through eminent domain or physical possession.'" *Esposito*, slip op. at 10, quoting *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (1985). The result in *Esposito* was based on the finding that none of appellants' homes had been destroyed and hence the rebuilding limitations had not yet been applied to any specific piece of property. As in *Esposito*, we look here to interference with the primary use of appellants' property as the principal consideration in the takings calculus. While *Esposito* reached the issue of whether a taking occurred, we do not. Instead, we decide here only when the injury occurred, not whether the injury was a taking. Specifically, we decide that the injury, which may or may not amount to a taking, occurred when the ordinance was enacted because its effect was then certain, not contingent, and because the injury complained of involved a significant interference with the primary use of specific property.

National suffered the regulatory interference with the primary uses of its property.

National contends that its cause of action did not accrue until the expiration of the 5 1/2 year amortization period in April 1989, when it faced the City's demand that the nonconforming signs be removed. Until then, National asserts, it suffered no actual injury because the 1983 ordinance was neither applied nor enforced against it. Given this, National contends that no "as applied" challenge to the ordinance was possible before April 1989; at best only a facial challenge to the ordinance's validity was possible prior to April 1989.[4]

National's contentions miss the mark. Immediately upon enactment, the 1983 ordinance interfered in a clear, concrete fashion with the property's primary use. Thus, on October 23, 1983, National's signs became "nonconforming outdoor advertising signs." As such, those signs became immediately subject to the restriction that "[a]ll

[4]National cites no decisions directly on point to support these contentions. Instead, it relies on general propositions to the effect (1) that "petitioners . . . face an uphill battle in making a facial [takings] attack," *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *see Pennell v. City of San Jose*, _ U.S. _, 108 S. Ct. 849, 856-57 (1988); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (rejecting claim that "mere enactment of [a] zoning ordinance constitute[d] a taking"), (2) that an "as applied" takings analysis requires a statute's having been applied "to specific property, and [inquiries conducted as to] the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances" of each case, *id.*; *accord Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. at 295; *see MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986), and (3) that a takings claim is "premature" where administrative compensation and review mechanisms have not been exhausted. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. at 348-52; *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 185-97 (1985). National also relies on cases holding that no taking occurs where a regulation "does not interfere in any way with the present uses" of property. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 136 (1978); *see MacLeod v. County of Santa Clara*, 749 F.2d 541, 547 (9th Cir. 1984), *cert. denied*, 427 U.S. 1009 (1985).

nonconforming outdoor advertising signs shall be discontinued or made conforming (amortized) within five and one-half (5 1/2) years from the date of this ordinance . . . . " The ordinance therefore interfered in a concrete fashion with National's primary use of its existing signs by mandating that this use change or cease within five years.

Moreover, National suffered actual, concrete injury on October 23, 1983. On that date, the useful lives of National's nonconforming signs were shortened from 30 years[5] to 5 1/2 years. Thus, the present value of the nonconforming signs was reduced accordingly. Had National sought to sell its nonconforming Raleigh signs between October 1983 and April 1989, a buyer would have discounted the value of these signs to account for their shortened life. Hence, on the date of the ordinance's enactment, there was both substantial interference with the property's primary use so as to affect distinct investment-backed expectations and also actual concrete injury accompanying that interference. Whether that interference was of such magnitude as to constitute an actual "taking" could have been determined upon the enactment of the statute in 1983. We do not reach the issue here of whether the interference "was of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" *Penn Central*, 438 U.S. at 136, quoting *Pennsylvania Coal Co. v.* Mahon, 260 U.S. at 413. We hold only that the injury suffered by National, an injury that might or might not rise to the level of a taking, occurred upon enactment of the ordinance at issue.[6]

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[5]National alleges in its complaint that its existing signs have remaining useful lives of up to 30 years.

[6]To determine whether the interference was so onerous as to constitute a taking requires a detailed analysis similar to that described in *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 176-78 (4th Cir. 1988). Such analysis would include designating the appropriate unit of National's property affected by the ordinance, and a detailed factual inquiry as to (1) the economic impact of the regulation on National, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Id.* at 176. Secondary findings underlying these determinations would include "the number of billboards that are economically useless, the terms of [National's] leases for billboard locations, the land [National] owns for billboard locations and whether it has any other economic use, the cost of billboards that cannot be

National contends that its injury was not "concrete" in October 1983 because uncertainty allegedly then existed as to which of National's signs were subject to removal upon expiration of the amortization period. National alleges that as late as January 1989, City officials were unsure whether certain of National's signs located along the National System of Interstate Defense Highways and the Federal-Aid Primary Highway System were subject to removal. This claim is refuted on the face of the ordinance itself. It makes clear that signs along the federal highway systems were exempted from the 5 1/2 year amortization scheme.[7] Hence, it was clear when the ordi-

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used, the depreciation taken on these billboards and their actual life expectancy, [and] the income expected during the grace period . . . ." *Id.* at 178. Such an analysis would reveal, prior to the expiration of the amortization period, whether the amortization period permitted a reasonable recoupment of National's investment. *See, e.g., Art Neon Co. v. City and County of Denver*, 488 F.2d 118, 122 (10th Cir. 1973) (upholding five-year amortization period for outdoor signs as reasonable prior to period's expiration), *cert. denied*, 417 U.S. 932 (1974); *see also Summey Outdoor Advertising, Inc. v. The County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439, 446 (1989) (same), *pet. for disc. rev. denied*, 326 N.C. 486, 392 S.E.2d 101 (1990); *R.O. Givens, Inc. v. Town of Nags Head*, 294 S.E.2d 58 N.C. App. 697, 294 S.E.2d 388, 391 (same with respect to five-and-one-half year period), *pet. for disc. rev. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982); *compare La Mesa v. Tweed and Gambrell Mill*, 146 Cal.App.2d 762, 304 P.2d 803 (1958) (holding invalid as a taking a five-year amortization period applied to building with estimated remaining economic life of 20 years).

[7]The ordinance stated in relevant part:

> WHEREAS, North Carolina General Statutes 136-131.1 prohibits the regulatory amortization of outdoor advertising signs adjacent to highways on the National System of Interstate Defense Highways and the Federal-aid Primary Highway System and that the gradual attrition of these outdoor advertising signs provides suppliers and consumers of outdoor advertising an abundant reservoir of locations within the Raleigh market . . . .
>
> BE IT ORDAINED BY THE CITY COUNCIL OF RALEIGH, NORTH CAROLINA that:
>
> . . . .
>
> All nonconforming outdoor advertising signs shall be discontinued or made conforming (amortized) within five and one-half (5 1/2)

nance was approved in 1983 that of National's thirty-six Raleigh signs, the sixteen signs located on federal highway systems were exempt from the specific provision requiring removal within 5 1/2 years.[8] Equally clear was that the twenty remaining signs were not so exempted. Because the ordinance applied in clear, specific ways to National's thirty-six signs when enacted, and because any injury to National was real and could be calculated in terms of reduced present value on October 23, 1983, National's cause of action arose on that date.

National's cited authority is not to the contrary. This authority emphasizes that takings challenges normally focus on a statute's application to specific property, rather than attacking a statute or ordinance on its face. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 495; *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. at 294-96. In this regard, the Supreme Court has explained that the very nature of takings inquiries usually necessitates an "as applied" rather than a "facial"[9] takings challenge:

> These "ad hoc, factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.

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years from the effective date of this ordinance ([October 23, 1983]), *unless explicitly prohibited by State Statute.*

(Emphasis added).

[8]The sixteen signs located along federal highway systems, while exempt from the removal requirement, still remained "nonconforming uses" subject to the ordinance's other restrictions, such as the prohibitions on reconstructing damaged nonconforming signs, moving existing nonconforming signs to new locations on their lots, or building more such signs along the federal highway systems. *Compare National Advertising Co. v. Bradshaw*, 48 N.C. App. 10, 268 S.E.2d 816, *appeal dismissed*, 301 N.C. 400, 273 S.E.2d 446 (1980) (holding illegal National's reconstruction of sign deemed nonconforming under state statute and located along federal highway system where sign was more than 50 percent destroyed by wind).

[9] A facial takings attack is a claim that the "mere enactment" of a statute constitutes a taking. *Hodel*, 452 U.S. at 295. An "as applied" challenge focuses on the effect of a statute's application to specific property.

Hodel, 452 U.S. at 295. Yet no such inquiry, National argues, could have been conducted until 1989 because the 1983 ordinance was not applied to any specific property until National was required to remove its signs in April 1989. Hence, it contends that an "as applied" challenge favored by *Hodel*, *Keystone* and similar cases could not have been mounted until 1989 and, at best, only a fruitless facial challenge could have been made in 1983. But the present matter is easily distinguished from cases involving premature facial challenges.[10] Here, the 1983 ordinance applied when enacted to specific property — National's thirty-six off-premise signs in the Raleigh area. The ordinance's language made clear that its 5 1/2 year amortization scheme applied to twenty of the thirty-six National signs, *i.e.*, those signs not located along federal highway systems. Thus, the "ad hoc, factual inquiries" that "must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation" relevant to a takings analysis, *Hodel*, 452 U.S. at 295, could have been con-

[10]Both *Hodel* and *Keystone*, for example, involved facial attacks on expansive regulatory programs affecting mining properties *in general*, but not specifically identified properties. Moreover, because owners might win variances or exemptions from the program, a challenge of the program's application to specific property was not yet ripe. In *Hodel*, the Virginia Surface Mining and Reclamation Association brought a facial takings challenge against interim regulations promulgated by the Department of the Interior pursuant to the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. § 1201 *et seq.* (1976 ed., Supp. III). The regulations, *inter alia*, required "steep slope" surface mine operators to return a mining site to its "approximate original contour." A mine operator could obtain a variance from this requirement, however, by showing that a site's new condition would allow a postreclamation economic or public use equal or better than what would otherwise be possible. *Hodel*, 452 U.S. at 284. The Supreme Court held that the regulations and underlying statute did not "on [their] face, prevent beneficial use of coal-bearing lands." *Id.* at 296. It noted that once the regulations were applied, operators might obtain variances, provided for in the regulations, from the contour requirement. It further observed that "the 'taking' issue suffers from a fatal deficiency: neither appellees nor the [lower] court identified any property in which appellees have an interest that has allegedly been taken by operation of the Act." *Id.* at 294. The Supreme Court reached a similar result when reviewing another facial challenge to a statute regulating coal mining in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 493-99.

ducted in 1983. There is, therefore, no error or injustice in holding that National could have mounted an "as applied" challenge in October 1983 and therefore its cause of action arose at that time.[11]

Decisions holding takings challenges to be "premature" because of the availability of administrative compensation and review mechanisms[12] are also inapposite. The 1983 ordinance did not establish any variance or administrative review procedures through which sign owners might obtain relief. Instead, it provided for immediate compliance without exception.[13] Moreover, the ordinance provided for no compensation other than what it referred to as "amortization." It stated that "amortization of nonconforming outdoor signs, in contrast to grandfathering these nonconformities, will eliminate the excessive number and amount of outdoor advertising signs and signage." Hence, just as there are no variance or compensation procedures which National must exhaust now before bringing its suit, none existed in 1983 to prevent ripeness of its suit.

Finally, National is mistaken in relying on cases holding that no taking occurs where regulations permit the current use of property to continue unhindered. *See Penn Central Transportation Co. v. City of*

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[11]Consistent with this conclusion are those decisions involving advertisers that attacked sign ordinances on takings grounds prior to the expiration of amortization periods. In none of those decisions was the attack challenged as premature. *See, e.g., Major Media of the Southeast, Inc. v. City of Raleigh*, 621 F. Supp. 1446, *aff'd*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987); *Summey Outdoor Advertising, Inc. v. The County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989), *pet. for disc. rev. denied*, 326 N.C. 486, 392 S.E.2d 101 (1990); *R.O. Givens, Inc. v. Town of Nags Head*, 58 N.C. App. 697, 294 S.E.2d 388, *pet. for disc. rev. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982).

[12]*See, e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. at 351-52; *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. at 186-191; *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. at 297.

[13]The ordinance stated: "*All* outdoor advertising signs shall be consistent with *all* definitions and shall comply with *all* standards and regulations of this code," and "*All* nonconforming outdoor advertising signs shall be discontinued or made conforming (amortized) within five and one-half (5 1/2) years . . . unless explicitly prohibited by State Statute." (Emphasis added.)

New York, 438 U.S. 104, 136 (1978); *MacLeod v. Santa Clara County*, 749 F.2d 541 (9th Cir. 1984). The regulations challenged in *Penn Central* and *MacLeod* had no impact on the current uses (a railroad station and a cattle ranch, respectively) of the properties at issue. Unlike those regulations, the 1983 ordinance had a specific and immediate impact on the current use of certain signs. It mandated that the current and perhaps sole use of twenty of National's nonconforming signs cease within 5 1/2 years, thus having a specific and immediate impact on the primary use of National's property.

In sum, when enacted the 1983 ordinance interfered in concrete ways with National's primary use of specific property — thirty-six signs. The district court therefore did not err in determining that National's takings cause of action arose in October 1983.

III.

National's second appeal ground is that its suit is timely because the 1983 ordinance created a continuing constitutional violation. This ground, too, fails because this is not a continuing violation case. As has been observed many times: "A continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981); *accord Ocean Acres Ltd. v. Dare County Bd. of Health*, 707 F.2d 103, 106 (4th Cir. 1983). Here, any taking occurred at the time of the ordinance's enactment; what continued was the ill effect of the ordinance's enactment and the alleged taking. No continuing unlawful acts have been shown.

In general, "[t]o establish a continuing violation . . . the plaintiff must establish that the unconstitutional or illegal act was a . . . fixed and continuing practice." *Perez v. Laredo Junior College*, 706 F.2d 731, 733 (5th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). The challenged action must be repeated within the statute of limitations period. As the *Perez* court observed in the context of employment discrimination:

> If the discrimination alleged is a single act, the statute begins to run at the time of the act. If, on the other hand, the statutory violation does not occur at a single moment but in

> a series of separate acts and if the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation and only those violations preceding the filing of the complaint by the full limitations period are foreclosed.

Id. at 733-34 (footnotes omitted).

With respect to statutory or regulatory challenges, we have previously found a continuing violation where regulations continued to be applied to persons within the statutory limitations period. *Virginia Hospital Ass'n v. Bailes*, 868 F.2d 653, 663 (4th Cir. 1989), *affirmed*, 110 S. Ct. 2510 (1989). Yet we have found no continuing violation where any harm to the plaintiff stemmed only from the initial application of a regulatory prohibition. *Ocean Acres Ltd. v. Dare County Bd. of Health*, 707 F.2d at 106. This distinction is well illustrated in the facts of the two cases. In *Virginia Hospital Ass'n v. Bailes*, we affirmed a district court opinion holding that "[t]he *continued enforcement* of an unconstitutional statute cannot be insulated by the statute of limitations." 868 F.2d at 663 (emphasis added). There, we held that plaintiff's claim that Virginia's procedures for reimbursing hospitals for the cost of treating Medicaid patients violated the Medicaid Act, 42 U.S.C.A. § 1396 *et seq.*, although brought four years after adoption of the procedures, was not barred by Virginia's applicable two-year statute of limitations. This conclusion rested on the holding that "the limitations period cannot protect an allegedly unconstitutional program." *Id.* On the other hand, in *Ocean Acres*, we determined that the "continuing wrong" exception did not apply to municipal ordinances banning the installation of septic tanks on certain properties. 707 F.2d at 105-07. In reaching this conclusion, we applied the two-part analysis outlined in *Cooper v. United States*, 442 F.2d 908, (7th Cir. 1971) for determining whether a continuing wrong exists: "The particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged, must all be considered." *Id.* at 912. Ultimately, we concluded there that plaintiff's allegations of harm focused "on the initial actions taken by defendants, not on a continuing course of conduct." *Ocean Acres*, 707 F.2d at 106. Moreover, statute of limitations policies were satisfied in *Ocean Acres* because at the time of the ban's enactment "[p]laintiff was aware of the actions taken by the county and of the impact of

those actions on its proposed [real estate] development." *Id.* at 107. Application of this two-part analysis leads to the same conclusions here.

National's claimed harm is that the 1983 ordinance restricted the use of its property without providing just compensation. The challenged municipal action, however, does not amount to a continuing wrong. The restriction on use and the economic loss of which National complains occurred upon enactment of the ordinance. No City action since then has added to National's alleged injury or otherwise constituted a taking. Seeking to avoid this conclusion, National points to a January 1989 letter from Raleigh, informing it that its nonconforming signs would have to be removed by April 1989, as a later wrongful act committed by the City within three years of National's suit. This argument misses the mark. The letter was not a new wrongful act, but merely a reminder of the restriction placed on National's signs in 1983. It caused National no additional injury, and is not itself the source of the alleged taking. The fact that National's signs ultimately were required to be removed or brought into conformity by April 1989 was one of the *effects* of their being deemed nonconforming upon enactment of the ordinance, not a separate violation. *Compare Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (plaintiff's loss of teaching position was merely "one of the *effects*" of alleged discriminatory denial of tenure; no "continuing violation" shown); *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979) ("[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful"). This is not an instance of a statute's repeated enforcement against different individuals or even the same parties, but of a statute applied once to a discrete set of individuals with a foreseeable, ascertainable impact. In sum, an examination of the "nature of the wrongful conduct and harm alleged," *Ocean Acres*, 707 F.2d at 106, points persuasively to the absence of a continuing wrong.

Finally, an examination of the "particular policies of the statute of limitations in question," *Id.* at 107, supports the conclusion that no unfairness results from finding that the continuing wrong exception is inapplicable here. National was aware of the 1983 ordinance from at least the date of its enactment. National participated in rulemaking proceedings prior to adoption of the ordinance and clearly knew of its

terms in 1983; moreover, National was required by law to be cognizant of the numerous restrictions placed on its signs upon the ordinance's enactment. Upon the adoption of the ordinance, National was in a position to challenge it. "[A] 'continuing wrong' theory should not provide a means of relieving plaintiff from its duty of reasonable diligence in pursuing its claims." *Ocean Acres*, 707 F.2d at 107. Permitting National to challenge the 1983 ordinance's amortization scheme more than 5 1/2 years after its adoption would enable National to retain its signs well beyond expiration of the amortization period and would be unfair to the City. Hence, statute of limitations policies militate against finding a continuing violation.

IV.

National contended before the district court that the 1983 ordinance on its face violates the First Amendment because it (i) restricts speech without promoting a legitimate government interest, (ii) is overbroad, and (iii) is unconstitutionally vague. The district court specifically addressed only the first of these claims, and found that it was barred by the three-year statute of limitations because "plaintiff had reason to know of this alleged injury at the time the ordinance became effective." Because it is doubtful that an ordinance facially offensive to the First Amendment can be insulated from challenge by a statutory limitations period, and since National's First Amendment claims raise purely legal issues which are well-settled, we review National's First Amendment claims on the merits.

National contends that the 1983 ordinance does not substantially advance a legitimate state interest and is overbroad because the effect of its size limitations will be to eliminate all outdoor off-premise advertising. Settled authority compels rejection of these claims. In *Major Media of the Southwest v. City of Raleigh*, we recognized that the Supreme Court "determined in *Metromedia [Inc. v. City of San Diego*, 453 U.S. 490, 508-11 (1981)]... that a city may justifiably prohibit all off-premise signs or billboards for aesthetic and safety reasons." 792 F.2d at 1272; *see also Suffolk Outdoor Advertising Co. v. Hulse*, 439 U.S. 808 (1979) (summarily upholding ordinance banning all off-premise billboard advertising); *Metromedia*, 453 U.S. at 508-11; at 540-41 (Stevens, J., dissenting in part); at 570 (Rehnquist, J., dissenting) ("the aesthetic justification alone is sufficient to sustain

a total prohibition on billboards within a community"). Because the 1983 ordinance was enacted to promote aesthetic and safety concerns,[14] National's first two First Amendment claims fail under *Metromedia*.

National's remaining First Amendment claim is that the ordinance is unconstitutionally vague because in certain limited instances it requires city officials to determine whether the contents of an advertisement are "commercial" or "non-commercial."[15] National contends that since the ordinance contains no definition of "commercial" or "non-commercial," insufficient guidance is given city officials. We rejected this precise contention in *Major Media of the Southeast v. City of Raleigh*, 792 F.2d at 1272, finding that the Supreme Court has already sufficiently defined these terms. *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 561 (1980) (commercial speech is "expression related solely to the economic interests of the speaker and its audience"); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (commercial speech "does 'no more than propose a commercial transaction'"), quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973); *Board of Trustees of the State University of New York v. Fox*, _ U.S. _, 109 S. Ct. 3028, 3031 (commercial speech "propose[s] a commercial transaction"). We further observed in *Metromedia* that:

> Although an occasional marginal case might arise raising

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[14]The ordinance states that its purpose is to "enhance property values, traffic safety, and [the] community appearance" of Raleigh.

[15]Raleigh's ordinance, as amended on December 4, 1984 by Ordinance 450 TC 228, states: "Any sign authorized in this chapter is allowed to contain non-commercial copy in lieu of any other copy." As we noted *Major Media of the Southeast v. City of Raleigh*, 792 F.2d at 1271 n.2, this amendment "seems to allow non-commercial copy to be placed on any on-premise sign (or any permitted off-premise sign) instead of commercial copy." In many instances, then, city officials are not required to determine whether an advertisement is commercial or non-commercial. However, in certain limited instances, if a sign is proposed for an area where neither on-premise nor off-premise signs are permitted, an inspector may nevertheless permit the sign if its contents are non-commercial. *Id.* at 1271. In these limited instances, an analysis of the contents of the sign is required.

> the question of whether on the particular facts the definition of commercial speech would be correct, such an infrequent possibility should not itself justify a generalized charge that the ordinance itself is vague, given the guidance afforded by the court decisions in the area.

Id. at 1272-73. We find no reason to depart from our previous holding.[16] In sum, we reject National's First Amendment claims on the merits.

Accordingly, we affirm the decision of the district court granting summary judgment to Raleigh.

AFFIRMED

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[16]We also note that even if the specific provisions of the Raleigh ordinance that require inspectors to consider the content of an advertisement were held invalid, the size limitations on off-premise advertising, which are the provisions that affect National, would remain in force. *See* Raleigh City Code § 14-1004 (discussing severability of "sections, paragraphs, sentences, clauses and phrases of this Code").

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 31, 1991

No. 90-3086
CA-89-332-5-CIV-BR

NATIONAL ADVERTISING COMPANY
Plaintiff-Appellant

v.

CITY OF RALEIGH, North Carolina
Defendant-Appellee

SOUTHERN ENVIRONMENTAL LAW CENTER
Amicus Curiae

On Petition for Rehearing with
Suggestion for Rehearing In Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Russell, with the concurrence of Judge Wilkins and Judge Ellis.

For the Court,

JOHN M. GREACEN
CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
NO. 89-332-CIV-5-BR

FILED
APR 27, 1990

NATIONAL ADVERTISING COMPANY,
a Delaware Corporation,
Plaintiff,

v.

CITY OF RALEIGH, NORTH CAROLINA,
Defendant.

ORDER

This matter is before the court on defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendant contends that plaintiff's action is barred by the statute of limitations and that if the court should find to the contrary, "a large portion of the claim is not firmly grounded in law and has been decided by recent decisions in this circuit and district." Plaintiff has responded to defendant's motion and the defendant has replied. The court heard oral argument on the motion on 27 February 1990. The matter is now ripe for disposition.

I. FACTS

On 18 October 1983 the City of Raleigh adopted Ordinance No. 210 TC 198 entitled "An Ordinance Regulating the Placement, Area, and Height of Outdoor Advertising Signs" which became effective on 23

October 1983 ("October 1983 ordinance"). The October 1983 ordinance limits the size of off-premise outdoor advertising signs (billboards) facing four-lane streets to 150 square feet and limits the size of off-premise billboards facing streets with less than four lanes to seventy-five feet. On-premise signs were not affected by the October 1983 ordinance. On-premise signs are defined in the 1979 ordinance as modified by the October 1983 ordinance as "signs located on the premises which direct[ ] attention to a business, profession, commodity, attraction, service, or entertainment conducted, offered, sold, manufactured, existing, or provided at a location on the premises where the sign is located or to which it is affixed."

The 1983 ordinance established a five and one-half year amortization period for removal of non-conforming signs. Except for ordinary maintenance and poster panel replacements, non-conforming billboards could not be altered, re-erected or moved during the amortization period unless the entire billboard was brought into conformity with the ordinance. The October 1983 ordinance specifically states that the amortization does not apply to billboards adjacent to highways on the National System of Interstate Defense Highways and the Federal-aid Primary Highway System because regulation of such signs is prohibited by North Carolina statute. On 4 December 1984 the City of Raleigh enacted Ordinance No 450 TC 228 which amended the October 1983 ordinance to include a provision which states that "[a]ny sign authorized in this chapter is allowed to contain non-commercial copy in lieu of any other."

The five and one-half year amortization period ended in April 1989 and plaintiff, National Advertising Company, a company engaged in the outdoor advertising business in Raleigh, filed a complaint on 28 April 1989 challenging the constitutionality of the ordinance.

Specifically, plaintiff contends the October 1983 ordinance violates the fifth and fourteenth amendments because the forced removal of non-conforming billboards constitutes a "taking" without just compensation. Plaintiff also contends the October 1983 ordinance violates the first amendment's guarantee of free speech which applies to the states through the fourteenth amendment because the ordinance effectively eliminates outdoor advertising as a means of communication and there are no reasonable alternative means of communication.

II. DISCUSSION

Defendant contends that plaintiff's lawsuit filed on 28 April 1989 is barred by the statute of limitations. Defendant first asserts that the plaintiff's claim is barred by N.C.G.S. 1-54.1 which establishes a nine-month statute of limitations for any "action contesting the validity of any zoning ordinance or amendment thereto . . . adopted by a city under Article 160A of the General Statutes or other applicable law." N.C.G.S. 1-54.1 (1983). Plaintiff argues that the nine-month statute of limitations does not apply to this action because plaintiff's challenge to the City's ordinance is not based on a procedural challenge to the validity of the ordinance but instead is based on 42 U.S.C. § 1983 which allows federal constitutional challenges to state or local laws. The court agrees with plaintiff.

Defendant contends that if N.C.G.S. 1-54.1 does not apply, plaintiff's action is governed by N.C.G.S. 1-52(2) which establishes a three-year statute of limitations for lawsuits based on "liability created by statute, either state or federal." N.C.G.S. 1-52(2) (1983). Defendant contends that plaintiff's action is barred by this statute of limitations because it was filed more than three years

after the effective date of the October 1983 ordinance. Plaintiff agrees that N.C.G.S. 1-52(2) provides the correct statute of limitations for this action because it is brought under § 1983. However, plaintiff contends that its action was timely filed because accrual of the statute of limitations did not begin until the amortization period ended.

Because there is no federal statute of limitations applicable to § 1983 actions, the applicable time limit in which a § 1983 action may be brought must be borrowed from state law. *Bireline v. Seagondollar*, 567 F.2d 260, 262 (4th Cir. 1977). It is clearly established that the three-year statute of limitations of N.C.G.S. 1-52(2) applies to actions brought in North Carolina pursuant to § 1983. *Cox v. Stanton*, 529 F.2d 47, 49 (4th Cir. 1975); *Bireline*, 567 F.2d at 263. The three-year statute of limitations applies to § 1983 actions because N.C.G.S. 1-52(2) establishes the time limitation applicable to actions based upon "a liability created by statute."

Although state law determines the applicable statute of limitations for a § 1983 action, federal law "fixes the time of accrual." *Bireline*, 567 F.2d at 263. Under federal law, the time of accrual is "that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Id.*; *Young v. Clinchfield Railroad Co.*, 288 F.2d 499, 503 (4th Cir. 1961). Here, defendant contends that plaintiff's cause of action accrued on 23 October 1983, the effective date of the October 1983 ordinance.

Plaintiff argues that its cause of action did not accrue until the end of the five and one-half year amortization period when enforcement of the ordinance began. At the earliest, plaintiff contends the date of accrual was not until 6 January 1989 when it first received notification by letter from the City that thirty-six of its billboards would have to be removed in April 1989. The City

admits that the January 1989 letter was the first enforcement step taken under the ordinance. Plaintiff asserts that the cause of action did not accrue until an actual injury occurred or was about to occur and that the immediate threat of forced removal of its billboards was the injury.

Plaintiff argues alternatively that the continuing wrong doctrine applies to this case thereby rendering its complaint timely filed. The continuing wrong doctrine is an exception to the accrual date of statutes of limitations. Under that doctrine if there is an ongoing constitutional violation accrual of the statute of limitations does not begin until the constitutional violation ends. *Virginia Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989). In order to determine whether the continuing wrong doctrine applies to this action, " '[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged must all be considered.' " *Ocean Acres Ltd. v. Dare County Bd. of Health*, 707 F.2d 103, 106 (4th Cir. 1983) (quoting *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971)).

The nature of the alleged wrongful conduct is the enactment of the October 1983 ordinance which required plaintiff to conform its billboards to the terms of the ordinance or remove the non-conforming billboards within five and one-half years from the effective date of the ordinance. The City has not taken any action since the enactment of the ordinance that would change the nature of the alleged wrongful conduct. The City's enactment of an ordinance in 1989 which established civil penalties for zoning violations does not change the nature of the alleged wrongful conduct because criminal penalties for zoning violations were in existence before 1989. Plaintiff knew as early as 23 October 1983 that in order to comply with the ordinance it had to conform its

non-conforming signs within five and one-half years. " 'A continuing violation is occasioned by continual unlawful acts, not continual ill effects from on original violation.' " *Ocean Acres Ltd.*, 707 F.2d at 106 (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)). Here, the alleged unlawful act occurred on 18 October 1981)). Here, the alleged unlawful act occurred on 18 October 1983 when the ordinance was enacted. The plaintiff does not contend that the City committed any other wrong. Therefore, plaintiff's challenge is only to the "continual ill effects of the original violation" which does not trigger application of the continuing wrong doctrine.

The harm alleged by plaintiff is a violation of the first amendment's guarantee of free speech applicable to the states through the fourteenth amendment and of the fifth and fourteenth amendments' prohibition of the taking of private property without "just compensation." The plaintiff contends that the ordinance violates the first amendment because there is no evidence that removal or reduction of the billboards will "substantially advance" a legitimate state interest as required by *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987). However, plaintiff knew or had reason to know of this alleged injury at the time the ordinance became effective.

Plaintiff contends in its amended complaint that the ordinance violates the fifth and fourteenth amendments because the amortization does not constitute just compensation. Because plaintiff's complaint tends to challenge the method of the "taking" rather than the "taking" itself, the injury occurred at the time plaintiff knew or should have known of the method to be used. *Ocean Acres*, 707 F.2d at 106-07. Plaintiff knew of 23 October 1983, the effective date of the ordinance, that its billboards must conform to the specifications of the ordinance. Plaintiff also knew on that same date that an

amortization period was provided for in the ordinance as compensation for the taking. Therefore, plaintiff's cause of action challenging the method of compensating for non-conforming billboards accrued on 23 October 1983.

The "particular policies of the statute of limitations in question" must also be considered in determining whether a continuing wrong doctrine applies. *Id.* "General polices of such statutes are applicable." *Id.* at 107. Plaintiff was aware of the ordinance because a representative of the plaintiff was at the City Council meeting on 22 September 1983 when the City Council was in the process of drafting and enacting the ordinance. Everyone is deemed to know the law and plaintiff does not deny that it knew that the ordinance was to become effective on 23 October 1983. Defendant argues, and the court agrees, that "[t]o allow a plaintiff to wait until the end of the amortization period to challenge its provisions places an unfair burden on the public whose elected representatives passed the legislation." In addition, "a 'continuing wrong' theory should not provide a means of relieving plaintiff from its reasonable diligence in pursuing its claims." *Id.* The court finds that the continuing wrong doctrine does not apply in this case and that plaintiff's cause of action challenging the constitutionality of the October 1983 ordinance accrued when plaintiff knew or had reason to know of the alleged injuries. *Bireline*, 567 F.2d at 263.

III. CONCLUSION

Because plaintiff knew of the alleged injuries resulting from the ordinance on 23 October 1983, plaintiff's constitutional challenges to the ordinance are barred by the three-year statute of limitations contained in N.C.G.S. 1-52(2). Summary judgment for the defendant is ALLOWED, and this action is dismissed.

This 27 April 1990.

/s/ W. EARL BRITT
W. EARL BRITT
United States District Judge

nac/cor/mmr

I certify the foregoing to be a true
and correct copy of the original.
J. Rich Leonard, Clerk
United States District Court
Eastern District of North Carolina
By /s/ Jolie Skinner
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

FILED
APR 27 1990
J. Rich Leonard, Clerk
U.S. District Court
E. DIST. NO. CAR.

NATIONAL ADVERTISING COMPANY,
a Delaware Corporation,
v.
CITY OF RALEIGH, NORTH CAROLINA,

JUDGMENT IN A CIVIL CASE

Case Number: 89-332-CIV-5-BR
Raleigh Division

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment for the defendant is allowed and this action is dismissed (BRITT, J).

THIS JUDGMENT FILED AND ENTERED ON APRIL 27, 1990, AND COPIES MAILED TO:

Odes Stroupe, Jr.
Hunton & Williams
P. O. box 109
Raleigh, NC 27602

Thomas A. McCormick, Jr.
City Attorney
P. O. Box 590
Raleigh, NC 27602

I certify the foregoing to be a true
and correct copy of the original.
J. Rich Leonard, Clerk
United States District Court
Eastern District of North Carolina
By /s/ Jolie Skinner
Deputy Clerk

April 27, 1990
Date

J. Rich Leonard
Clerk

/s/ Jolie Skinner
(By) Deputy Clerk

APPENDIX D

ORDINANCE NO. (1983) - 210 TC 198

An ordinance regulating the placement, area, and height of outdoor advertising signs.

WHEREAS, the City of Raleigh on 2 January 1979 enacted a sign ordinance, Ordinance No. (1979) 982 TC 96, which: allowed industry standard six hundred and seventy two square foot size outdoor advertising signs, permitted outdoor advertising signs to locate within zoning districts and adjacent zoning districts which allow residential dwelling units, and grandfathered nonconforming outdoor advertising signs, and

WHEREAS, since the passage of Ordinance No. (1979) 982 TC 96, there has been a proliferation in the number of outdoor advertising signs throughout the zoning jurisdiction of the City of Raleigh; and

WHEREAS, there were approximately two hundred thirty two outdoor advertising signs in the Raleigh zoning jurisdiction in July, 1982; and

WHEREAS, between July 1982 and July 1983 over one hundred permits for outdoor signs were issued by the Raleigh permits office; and

WHEREAS, the number of outdoor advertising signs and the amount of outdoor advertising signage has adversely affected residential and nonresidential property values and has made it more difficult to attract new businesses and industry; and

WHEREAS, the number of advertising signs and the amount of outdoor signage has adversely affected the appearance of the community; and

WHEREAS, the City of Raleigh is empowered by N.C.G.S. 106A-381 and N.C.G.S. 160A-382 to regulate and restrict the size, location, construction, reconstruction, alteration, repair and use of signs; and

WHEREAS, enactment of the regulations hereinafter set out will reduce the number of outdoor advertising signs and the amount of outdoor signage and it will enhance property values, traffic safety, and community appearance of the capital city; and

WHEREAS, six feet by twelve feet poster panels are a national medium for outdoor advertising with approximately one hundred thousand of these poster panels available in over one hundred cities nationwide; and

WHEREAS, Carolina Poster Company has over sixty-four six feet by twelve feet poster panels in Raleigh-Durham and over four hundred of these poster panels in North and South Carolina; and

WHEREAS, the Naegele Outdoor Advertising Company uses six feet by twelve feet poster panels in Raleigh, North Carolina, Jacksonville, Florida and Minneapolis and St. Paul, Minnesota; and

WHEREAS, the Summey Sign & Outdoor Advertising Company of Black Mountain, North Carolina has approximately fifty four six by twelve feet poster panels in Asheville and Hendersonville; and the Schloss Outdoor Advertising Company has approximately twenty-five six by twelve feet poster panels in Charlotte, North Carolina; and

WHEREAS, the 3M National Advertising Company has eighty six feet by twelve feet poster panels in Charleston, South Carolina; and

WHEREAS, six feet by twelve feet poster panels are used by national advertisers such as Coca-Cola, Orkin, Texaco, United States Army, and the Salem cigarettes; and

WHEREAS, replacing the existing one thousand foot linear spacing standard with a one thousand foot radial standard will disperse the present concentration of outdoor advertising signs; and

WHEREAS, the City of Raleigh within the last five years has enacted transitional yard standards, tree planting requirements in both off-street parking areas and along thoroughfare yards, and on-premise sign regulations as part of its concerted city-wide effort to protect and enhance the aesthetic quality of the Capital City and its environs; and

WHEREAS, in October 1982 the Raleigh City Council in Work Session discussed ten city-wide community appearance projects, one of these projects discussed was the enactment of more stringent outdoor advertising sign regulations; and

WHEREAS, amortization of nonconforming outdoor advertising signs, in contrast to grandfathering these nonconformities, will eliminate the excessive number and amount of outdoor advertising signs and signage; and

WHEREAS, approximately one hundred and forty outdoor advertising signs in the Raleigh zoning jurisdiction or nearly 41.7 percent of the total number of outdoor advertising signs are located adjacent to highways on the National System of Interstate Defense Highways and the Federal-aid Primary Highway System; and

WHEREAS, North Carolina General Statutes 136-131.1 prohibits the regulatory amortization of outdoor advertising signs adjacent to highways on the National System of Interstate Defense Highways and the Federal-aid Primary Highway System and that the gradual attrition of these outdoor advertising signs provides suppliers and consumers of outdoor advertising an abundant reservoir of locations within the Raleigh market.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF RALEIGH, NORTH CAROLINA that:

Section 1. Section 10-2066 *et seq.* of the Raleigh City Code is hereby repealed, rewritten, and reenaced to read as follows:

Sec. 10-2066. Off-premise signage (outdoor advertising signs).

Purpose: For the purpose of regulating excess signage, encouraging the positive economic development of the City, promoting the safety of the traveling public, protecting existing property values in both residential and non-residential areas, preventing the overcrowding of land, promoting a positive community appearance as part of a concerted city-wide effort to protect and enhance the aesthetics of the Capital City for the enjoyment of all citizens of North Carolina, outdoor advertising signs are herein regulated.

The regulations are designed to prevent their overconcentration, improper placement, and excessive height, bulk, number and area. It is recognized that, unlike on-premise identification signs which are in actuality a part of a business outdoor advertising is a separate and distinct use of the public thoroughfare. With a view to this distinction, outdoor advertising signs are regulated differently from on-premise signs. It is intended that outdoor advertising signs be located away from residential areas, and that such signs be regulated to protect the character of the area wherein outdoor advertising signs are located, and to conserve property values in these areas.

Sec. 10-2066.1. Design regulations.

All outdoor advertising signs shall be consistent with all definitions and shall comply with all standards and regulations of this code. Except for ordinary maintenance, poster panel replacement, copy changes, or repair not involving structural, material, or electrical changes, no outdoor advertising signs, or part thereof, shall be erected, altered, constructed, changed, converted, re-erected, additionally illuminated, reduced in size, enlarged, or moved unless the entire outdoor advertising sign and structure are brought into conformity with this code.

(1) Area of outdoor advertising signs. No outdoor advertising sign facing streets with four or more traffic lanes may exceed one hundred and fifty square feet; outdoor advertising signs facing streets with fewer than four traffic lanes may not exceed seventy-five (75) square feet. The sign areas is measured by finding the area of the minimum imaginary rectangle or square of vertical and horizontal lines which fully enclose all extremities of the sign, excluding supports, the base or apron unless such copy, message, announcement or, decoration appears on the base or apron. The allowable sign area of signs with equal size and shape for both double-faced (back-to-back) and V-type signs is measured by computing the area of only one side of the sign. Both sides of a double-faced or V-type sign shall be of equal size. The sign area of signs with three (3) or more sides (multiple-side signs) containing copy message, decoration, or announcement visible from a street highway or expressway is measured as the sum of the area of any two (2) adjacent sides.

(2) Height. No outdoor advertising sign or part thereof, including base or apron; supports; supporting structures; and trim, may exceed thirty (30) feet in height.

(3) Setback requirements. Setback and yard requirements contained in this chapter are not applicable to outdoor advertising signs.

(4) Construction standards.

a. Compliance with building codes. All signs shall comply with the appropriate detailed provisions of the North Carolina and city building codes, the National Electric Code and other provisions of the Code of the City of Raleigh.

b. Clearance from high voltage power lines. Outdoor advertising signs shall be located in such a way that they maintain horizontal and vertical clearance of all overhead electrical conductors in accordance with the National Electric Code provided that in no case shall an outdoor advertising sign be erected closer than ten (10) feet horizontally or vertically from any conductor or public utility guy wire.

c. Corner lots. No part of an outdoor advertising sign may be located within a triangular area formed by the street right-of-way lines and a line connecting them at points fifty (50) feet form the right-of-way intersection.

d. Spacing of signs. No part of any outdoor advertising sign shall be located less than one thousand (1,000) feet from any part of another outdoor advertising sign when located within either two (2) two hundred (200) foot corridors along each side of a roadway. The two corridors shall be delineated by connecting perpendicular measurements from all points along the road rights-of-ways. No part of any permitted outdoor advertising sign which is located outside of the two hundred (200) foot corridor areas may be located within a one thousand (1,000) foot radius of any other outdoor advertising sign.

Sec. 10-2066.2. Specific outdoor advertising sign regulations.

Outdoor advertising signs and structures which comply with the provisions of this code are permitted in any industrial zoning district provided the specific sign location is four hundred (400) feet or more from any zoning district which allows any dwelling unit.

Sec. 10-2066.3. Prohibited signs.

The provisions contained in section 10-2065.5 are expressly made applicable to all outdoor advertising structures.

Sec. 10-2066.4. Nonconforming off-premise signs (amortization).

All nonconforming outdoor advertising signs shall be discontinued or made conforming (amortized) within five and one-half (5 1/2) years from the effective date of this ordinance unless

explicitly prohibited by State Statute. All outdoor advertising signs which are made nonconforming by an amendment to this chapter, or to the official zoning map, or extension of the areas in which this ordinance is applicable shall be discontinued or made conforming (amortized) within five and one-half (5 1/2) years after the date of such amendment or extension, unless explicitly prohibited by State Statute.".

Section 2. Section 10-2044(b) of the Raleigh City code which allows outdoor advertising sign in neighborhood business zoning districts is repealed in its entirety.

Section 3. Section 10-2044(2) of the Raleigh City Code relating to neighborhood business districts is hereby repealed, rewritten, and reenacted to read as follows:

"(2) Prohibited uses. The following uses are prohibited in a neighborhood business district:

a. Any use prohibited in a shopping center district.".

Section 4. Section 10-2045(2)h of the Raleigh City Code relating to prohibited uses in the business district is hereby repealed, rewritten, and reenacted to read as follows:

"h. Billboards and outdoor advertising structures and signs.".

Section 5. Section one of ordinance no. (1983) 153 TC 190 enacted July 14, 1983 and is to be codified as Raleigh City Code section 10-2045.1(1)(b) is hereby deleted in its entirely and subsections (c) through (k) are relettered 10-2045.1(1)(b) through 10-2045.1(1)(j), respectively.

Section 6. Section one of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2045.1(1)(k) is relettered

10-2045.1(1)(j) and the references in subsection (3) therein to pre-existing outdoor storage use described in 10-2045.1(1)(i) and to pre-existing outdoor storage use of vehicles boats, mobile homes, etc. described in 10-2045.1(1)(j) are hereby changed to 10-2045.1(1)(h) and 10-2045.1(1)(i) respectively.

Section 7. Section one of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2045.1(3)(c) is hereby amended to change the reference therein from 10-2045.1(1)(k) to 10-2045.1(1)(j).

Section 8. Section one of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2045.1(3)(d)2 is hereby amended to delete the following punctuation and words therefrom ", except billboard,".

Section 9. Section one of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2045.1(4) is hereby amended to add a new subsection, (g), said new subsection is to follow 10-2045.1(4)(f) and shall read as follows:

> "(g) billboards and outdoor advertising structures and signs.".

Section 10. Section one of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2045.1(5)(a)(3) is hereby amended to change the references therein from 10-2045.1(1)(i), (j), and (k) to 10-2045.1(1)(h), (i), and (j) respectively.

Section 11. Section one of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2045.1(5)(a)(10) is hereby amended to change the references therein from

10-2045.1(1)(i) and (j) to 10-2045.1(1)(h) and (i) respectively.

Section 12. Section one of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2045.3 is hereby amended: to replace the semicolon in subsection 10-2045.3(a) with a period, to delete the word "and" following that period, and to repeal 10-2045.3(b) in its entirety.

Section 13. The first sentence of section two of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2002 protective yard is hereby amended: to add the word "or" after the word "storage", to change the comma following the words "loading areas" to a period, and to delete the last three words from that sentence which read as follows "or off-premise signs".

Section 17. Section 10-2064(a)(5) of the Raleigh City Code relating to height, limitations in industrial zoning districts is hereby amended to add at the beginning of said section the following: "except billboards,".

Section 18. Section 10-2064(b)(5) of the Raleigh City code relating to height limitations of signs is hereby amended to change the code references therein from 10-2065.1(a) to 10-2065.1(1) and from 10-2065.1(b) to 10-2066.1(2).

Section 19. The definitions of on-premise sign and off-premise sign contained in Raleigh City code section 10-2002 are hereby amended to add after the word "commodity" the following ", attraction," and to add after the word "manufactured" the following ", existing,".

Section 20. Nothing in this ordinance or in section 10-2065 of the Raleigh City Code shall apply to non-commercial signs.

Section 21. All ordinances and clauses in conflict herewith are hereby repealed to the extent of said conflict.

Section 22. This ordinance has been adopted following a duly advertised joint public hearing of the Raleigh City Council and the City Planning Commission following a recommendation of the Planning Commission.

Section 23. If this ordinance or application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or application of the ordinance which can be given separate effect and to this end the provisions of this ordinance are declared to be severable.

Section 24. This ordinance shall be enforced as provided in N.C.G.S. 160A-175

Section 25. This ordinance shall become effective five (5) days following its adoption.

ADOPTED: 10/18/83

EFFECTIVE: 10/23/83

DISTRIBUTION: City Council
City Manager
City Attorney
Planning Director (5)
Inspections (3)

W3951

Supreme Court, U.S.
FILED
APR 24 1992
OFFICE OF THE CLERK

(2)

No. 91-1555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL ADVERTISING COMPANY,

Petitioner,

v.

CITY OF RALEIGH,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THOMAS ALEXANDER MCCORMICK
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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Does the accrual date for statute of limitations purposes begin to run as soon as a newly adopted piece of legislation has some concrete effect on a property owner, and if so, what is the appropriate length of the limitation period?

PARTIES TO THE PROCEEDING

As noted in the petition, all parties are listed in the caption.

RULE 15.1 STATEMENT

Rule 15.1 of the Rules of the Supreme Court admonish Respondents to bring to the Court's attention any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. In compliance with Rule 15.1, Respondent makes the following observations:

1. Petitioners' issues and argument are in large part based upon its contention that the ordinance in question had no effect on its business immediately upon passage in 1983. The fact is that the lower court did determine that actual and significant impacts did occur and, because of those impacts, made its decision. Petitioners' questions presented do not fairly represent the factual findings of the lower court.

2. Petitioner also contends that it was directed by the City to remove all its signs, including those located on Federal Aid Primary and Interstate highways. Such signs are protected by both state and federal law and are exempted from removal requirements by the clear language of the ordinance itself. (App. D)

RULE 29.1 STATEMENT

The Respondent, City of Raleigh, is a municipal corporation organized and operating under the laws

of North Carolina and has no other corporate affiliations or relations of any kind.

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STATEMENT

On October 18, 1983 the City of Raleigh enacted an Ordinance (No. 1983-210 TC 198) to control the proliferation of off-premise signs (billboards) in the City's zoning jurisdiction. (App. D)

In 1984, the ordinance was unsuccessfully challenged by Major Media of the Southeast, a large billboard operator. See *Major Media of the Southeast, Inc. d/b/a Naegele Outdoor Advertising Co. of Raleigh-Durham v. City of Raleigh*, 792 F. 2d 1269 (4th Cir., 1986) cert. denied, 479 U.S. 1002, 94 L. Ed 2d 185, 107 S. Ct. 1334 (1987). That action, filed some six months after the enactment of the ordinance, was a claim grounded, as is the case *sub judice*, in purported violations of the First and Fifth amendments to the United States Constitution.

The ordinance in question was effective on October 23, 1983. The ordinance does not prohibit billboards in Raleigh but does dramatically change the requirements for new billboards and, as of October 23, 1983, makes all then existing billboards nonconforming if they did not comply with any of the requirements for new signs. Those requirements concerned height (a thirty foot maximum), area (a 150 square foot maximum), and certain spacing or separation requirements generally requiring one billboard to be at least one thousand (1,000) feet from the next closest billboard. The ordinance also restricted the number of the City's zoning classifications into which billboards might be placed. Since October 23, 1983, all decisions relating to the permitting, locating, size, spacing, and zoning conformance status of billboards have been made according to the challenged ordinance. A non-

conforming billboard could not be replaced if destroyed.

ARGUMENT

A.

National's principal disagreement with the Court of Appeals and the District Court seems to be a belief that these bodies do not understand the law of ripeness, or that if they do understand it they have misapplied it. As an alternative argument, National contends that there is "hopeless confusion" nationally on this question and therefore, this Court must intervene. Such is simply not the situation. This court has clearly laid out the framework for evaluating the ripeness of land use issues.

As a beginning, this Court has been wise enough to realize that regulatory takings require an ad hoc analysis of the facts involved in the particular case. *Kaiser Aetna v. United States*, 444 U.S. 164, 62 L. Ed 2d 332 (1979). National's petition argues that "This case further muddies the waters by holding that damage occurs *upon enactment* of a land use regulation."

The case below makes no such holding and no such holding was sought at the trial or appellate level by Respondent. No fair reading of the Fourth Circuit or the District Court opinion could cause a reasonable reader to infer that such a sweeping rule was being made. The Court of Appeals did decide that in a situation where an ordinance had immediate and serious impact on a property owner, the property owner needed to come forward and assert his claim. Both the District Court and the Court of Appeals dealt

with an ad hoc analysis of the fact situation and determined thereby that this ordinance and fact situation were ripe for review on October 23, 1983. The Fourth Circuit noted that it was possible on that date to determine the identity and location of every sign to be affected by the ordinance. The ordinance on its face is self-executing and the provisions of the ordinance made the signs nonconforming on the date the ordinance became effective, *not* $5^1/_2$ years later. National contends that a valuation of the signs in 1983 would have been purely hypothetical, but how could it have been any less hypothetical than an analysis or appraisal done $5^1/_2$ years after ordinance passage when National claims that the life of a sign is at least 30 years? National further argues that the City's enactment of a general civil penalty for *all* zoning violations (not just billboard violations as indicated in the petition) somehow made it impossible to determine damages in 1983. This argument defies logic on two grounds. First,the penalties only apply to those who disregard the law. If National obeyed the law there would be no penalty. Second, a violation of any city ordinance, at the time of passage of the billboard ordinance and after, was already a criminal offense and carried a misdemeanor criminal penalty.

This case establishes no new ripeness rules. This case does apply the existing rules to an undisputed fact situation. Contrary to the petitioner's implication, this case has no specific application to zoning cases, wetland cases, subdivision cases, rent control cases, development permit cases, or any other land use cases. What it will relate to is other billboard, cases where the ordinance contains a self-executing, non-reviewable or non-variable amortization provision.

Again, contrary to National's implication, the nation's courts are not in a state of confusion regarding these cases and the ripeness question. This court and many others around the country have found these matters ripe for adjudication. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882 (1981) (suit brought less than 3 months after the enactment of a 4 year amortization period); *Summey Outdoor Adv. v. County of Henderson*, 96 N.C. App. 533, 386 S.E. 2d 439 (1989) pet. for disc. rev. denied, 392 S.E. 2d 101 (1990) (suit brought within 9 months of enactment of a 5 year amortization period); *Naegele Outdoor Advertising Co. v. City of Durham*, 844 F. 2d 172 (4th Cir. 1988) (suit brought within 9 months of enactment of $5^1/_2$ year amortization period); *Georgia Outdoor Adv. Inc. v. City of Waynesville*, 833 F. 2d 43 (4th Cir. 1987) (suit brought within 5 months of enactment of a 4 year amortization period); and *Major Media of the Southeast, Inc. v. City of Raleigh*, *supra* (suit brought within 10 months of a $5^1/_2$ year amortization period.) The last case is noteworthy in that it was a challenge, albeit by another plaintiff, to exactly the same ordinance now being challenged by the petitioner. Evidently the *Major Media* plaintiff had no trouble realizing the ordinance's effects on it and immediately sought to protect itself. Ripeness may be raised by a court *sua sponte* whether or not the parties all wish a decision on the merits. *Federal Practice and Procedure 2d*, Wright, Miller, and Cooper §3532.1 Judicial Power Footnote 37; *Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102 (1974). National must face the fact that its signs became nonconforming on October 23, 1983, *not* $5^1/_2$ years later on April 24, 1989. The sand in the amortization hourglass began to run on October 23, 1983, *not* April 24, 1989. Na-

tional's status changed in 1983, *not* 1989. National knew upon passage of the ordinance the exact date by which its nonconforming signs must be removed. National also was prohibited from moving to another location in the city any of its signs which were too big or too tall and National was prohibited from replacing a nonconforming sign destroyed by a casualty. *National Advertising Co. v. Bradshaw*, 268 S.E. 2d 816 (1980).

B.

STATUTE OF LIMITATIONS FOR CONSTITUTIONAL CLAIMS

National also contends that, because the Court found the Fifth Amendment claim to be insulated by a statute of limitations, while finding that the First Amendment claim was not, an internal inconsistency exists in the opinion. No such inconsistency exists. The Circuit Court did not determine that the First Amendment claim was not subject to a statute of limitations. The opinion indicates that it may be "doubtful", but the Court does not decide the question because the claim was frivolous to start with inasmuch as this area of the law is well settled both at the national and state levels and did not require the court to reach that issue. National never had a realistic First Amendment claim and the Circuit Court's analysis in this case was done to point out that fact. A review of the record in this matter will reveal that the original complaint filed herein did not contain any allegations relating to a First Amendment violation. National's First Amendment claim was added later by way of an amended complaint even though the Circuit Court had already ruled on the

First Amendment validity of this and similar ordinances. Even had the Circuit Court actually held that the First Amendment claim could not be barred by a statute of limitations defense, such a ruling would not impugn the application of such a defense as it relates to the Fifth Amendment takings claim. It is well settled through state and federal inverse condemnation law that statutes of limitations most certainly do apply to "takings claims".

The City's motion for summary judgment on the First Amendment question was broached in the alternative. The District Court was asked to apply either a statute of limitation or to decide the case on the basis of *stare decisis*. Nothing prevented the Circuit Court from taking either approach and it chose the latter.

Even if the Circuit Court actually intended to hold that the statute of limitations was not applicable to First Amendment claims, it has not created a conflict or an inconsistency. Our jurisprudence historically notes a hierarchy of importance for the various amendments to the Constitution and the First Amendment has always enjoyed a high position in that hierarchy and has been differently treated for questions of standing and other purposes.

Some ordinances or practices, as pointed out in the petition, have been challenged long after enactment, but all such challenges are made either due to the operation of the "continuing wrong" doctrine (expressly ruled inapplicable in this case) or simply to the fact that a statute of limitations defense is an affirmative defense which is waived if not pleaded.

Finally, although it did not raise the matter at the district court or the appeals court level (except in a

rehearing petition), the petitioner now argues that because it arguably brought an action pursuant not only to 42 U.S.C. §1983 but also pursuant to the Fifth Amendment itself, it is entitled to some longer statute of limitations. Petitioner is not certain what that period is as evidenced by its casual adoption of the terms "adverse possession" and "inverse condemnation" as synonyms but is certain that, whatever its length, Petitioner feels that it must be long enough to encompass the dilatory period it waited before seeking redress for its supposed losses. Toward this end the petition looks to *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F. 2d 575 (9th Cir. 1991) to justify its position.

Actually, *Azul Pacifico* is interesting because of the striking degree to which it is compatible with the opinion of the Circuit Court in this case. *Azul Pacifico* clearly makes a distinction between a physical, possessory, taking such as the one which occurred in that case and a regulatory type of taking case such as the one now before the Court. In this ordinance there is never a physical invasion, seizure, or occupation of any of a company's billboards. The owner reserves the right to relocate or salvage the structures. *Azul Pacifico* recognizes that the regulatory case required an ad hoc analysis just as the court applied in this case. *Azul Pacifico*, unlike Petitioner, correctly characterizes *Pennell v. City of San Jose*, 485 U.S. 1, 99 L. Ed 2d 1 (1988), as a ripeness case and not a standing case. *Azul Pacifico* also holds that the limitations period for takings claims begins to run the date the challenged ordinance is enacted. In fact, *Azul Pacifico* is in total harmony with the instant case except that the 9th Circuit also determined that

a separate non §1983 claim for taking had been made with the sole jurisdictional basis being the Constitutional itself. However, a review of the cases cited by the 9th Circuit fail to support that position. All of the cited cases are based upon some statute which grants jurisdiction for a Fifth Amendment claim and sets up the procedures for pursuing the claim. Also, all of the cited cases deal with actual physical invasions and occupation of private property just as *Azul Pacifico* does. *Kirby Forest Industries v. U.S.*, 467 U.S. 1, 81 L. 3d 2d 1 (1984) dealt with a condemnation of land to create Big Thicket National Park by the National Park Service pursuant to Title 40 U.S.C. §357, a statute dealing with Indian lands and how the same might or might note be condemned. *U.S. v. Causby*, 328 U.S. 256, 90 L. Ed 1206 (1945) dealt with condemnation of land by overflight at the Greensboro, N.C. airport and was decided on the basis of jurisdiction granted by 28 U.S.C. §250 relating to the Court of Claims. While it is true that the Constitution tells us how to compensate for a taking, it does not conceal a separate grant of jurisdiction or create a separate cause of action outside of some statutory scheme for enforcement. Remember again, *Azul Pacifico* dealt with a physical taking. No such physical taking has occurred in this case and the remedy for a regulatory taking is still at §1983 action.

Even assuming, *arguendo*, that such a distinct cause of action exists, it would still be barred by the statute of limitations. National has incorrectly represented to this Court and the Court of Appeals that the statute of limitations for inverse condemnation in North Carolina is 20 years. That period is quite erroneous. The statute of limitations for inverse condemnation in

North Carolina is 2 years. *Wilcox v. N.C. Highway Commission*, 181 S.E. 2d 435 (1971). Also, G.S.N.C. 40A-51. Obviously, National has also missed this limitation period. Even if it were decided that an additional federal cause of action does exist, it would still use a statute of limitations. Congress has not established any statute of limitations for claims under the Fifth Amendment made against local and state government. When congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so. *Wilson v. Garcia*, 471 U.S. 261, 85 L. Ed 2d 254 (1985). The absorption of state statutes of limitations within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken, but left matters for judicial determination within the general framework of familiar legal principles. *Runyon v. McCrary*, 427 U.S. 160, 49 L. Ed 2d 415 (1976). Even the *Azul Pacifico* opinion noted that "state statutes have repeatedly supplied the periods of limitations for federal causes of action when federal legislation has been silent on the question". *Id.* at 13604 quoting *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 16 L. Ed 2d 192 (1966).

The only justification for a federal statute is a reference to the possibility of thwarting uniform treatment of takings cases. This position fails to pass logical evaluation inasmuch as the same principle applies to §1983 litigation and yet, the courts have found a uniform class of period (personal injury) to be appropriate even though the actual length of the period varies from state to state. There is no justification

for using 28 U.S.C. §2401 since that is clearly a jurisdictional statute for actions against the United States.

The *Azul Pacifico* rationale is based entirely on the premise that the type of ordinance involved (rent control) constitutes a physical taking. However, on April 1, 1992 this Court decided *Yee v. City of Escondido, California*, No. 90-1947. *Yee* specifically overruled *Azul Pacifico* on the physical taking question and further held that the highest state court's contra position was the correct one. As much as *Azul Pacifico* supports its position, the respondent is convinced that it now provides questionable authority for either side in this petition proceeding.

SUMMARY

The rules of this Court (Rule 10.1) establish strict guidelines for the criteria which must be met before this Court will issue the writ of certiorari. These tests, and the reasons Petitioner fails them, are as follows:

a. **WHEN A UNITED STATES COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME MATTER; OR HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH A STATE COURT OF LAST RESORT; OR HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

Despite all its fulminations and tortured exercises in logic, Petitioner has failed to show that its case meets any of the tests in Rule 10.1(a). Petitioner can

show no conflict with any other circuit on this question. Neither can it show a conflict with the court of last resort in North Carolina or any other state. Indeed, as shown by the cases cited by the Respondent, every court, including this one, which has addressed this type of case has found that the matter was ripe for adjudication and has proceeded to deal with the matter. The principal holding of the only case cited by Petitioner has recently been overruled in its relevant parts by this Court. Nor is there anything in the record of this case to indicate that the action below was such a vast departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory powers. The court below has simply taken the rules set out by this court in *Williamson County Reg. Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985) and other cases and applied those rules to a factual situation. In *Williamson* this Court has held that no takings issue is ripe if the government has provided an adequate process for obtaining compensation, the plaintiff has not sought or utilized the procedures for obtaining such compensation, and no administrative relief is available. The obverse of this holding would be that a matter is ripe when no adequate provision for obtaining compensation exists, and no process exists to obtain such compensation. In this case that is exactly what National has alleged. National has alleged that the ordinance denied just compensation and denies it a process to obtain compensation. Therefore, based on *Williamson*, National's causes of action were ripe for determination upon the effective date of this ordinance.

b. WHEN A STATE COURT OF LAST RESORT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT OR OF A UNITED STATES COURT OF APPEALS.

This test is not available to Petitioner since no state court of last resort decisions are in any way involved herein except for ones which are in accord with the resulting this case.

c. WHEN A STATE COURT OR A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, OR HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFIICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Petitioner also fails to meet the criteria of Rule 10.1(c). This Court has established the rules relating to ripeness by way of the cases cited in Petitioner's petition. What Petitioner disagrees with is the court of appeals findings of fact to which it applied those rules. Nevertheless, the courts below did determine that there was a final impact on Petitioner. The courts below had to make this finding before they could determine whether the limitations period should begin to run. This decision can only serve to clarify the law of ripeness, not to confuse it.

Apart from fairness and finality, there is another policy issue that should be considered. If landowners are allowed by this court to wait until the end of the amortization period to file litigation, it will inevitably extend the amortization period, and thereby disturb the legislative judgment about what length of time is a reasonable amortization period—a judgment which

is given great weight. *Texaco v. Short*, 454 U.S. 516, 70 L. Ed 2d 738, 102 S. Ct. 781 (1982); *State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320 appeal dismissed 422 U.S. 1002, 95 S. Ct. 2618, 45 L. Ed 2d 666 (1975). Extension of the amortization period will occur in one of two ways. Either landowners will obtain a preliminary restraining order during the pendency of the litigation or local governments when confronted with litigation, will not force abatement of the nonconformities until the litigation is ended. A prudent government, especially in these financially troubled times, will not force removal but instead will await the outcome of the litigation and then either enforce removal or amend the ordinance. The events in this case confirm the validity of these statements. The City of Raleigh has refused to demand that Petitioner remove its nonconforming billboards, because of the uncertainty created by this suit. The outcome shows that full implementation of the duly adopted sign policy of the City has been delayed. Petitioner billboard company for over the last three years has successfully defied the public will.

Judge Ellis writing for the Court of Appeals observed that permitting the billboard company to challenge the 1983 ordinance's amortization scheme more than $5^1/_2$ years after its adoption, would enable the company to retain its signs well beyond expiration of the amortization period and would be *unfair to the City.*

CONCLUSION

The United States Supreme Court should not exercise its discretion to hear this case. The Court

should refuse to exercise its discretion on the following grounds:

1. This case does not confuse the law concerning "ripeness". This case merely applied existing principles and rules established by this Court to a real life fact situation. Petitioner fails to recognize that it is just as wrong to bring an action too late as it is to bring it too soon. Petitioner suffered immediate, substantial damage and should have sought to protect itself just as numerous other plaintiffs around the country have done, including one who challenged the very ordinance now subject to assault by Petitioner.

2. This case does not require that a suit be filed before a cause of action exists. The cause of action arose when the enacted ordinance immediately changed the status and future capabilities of Petitioner's signs. Petitioner delayed litigation only for the purpose of effectively extending the amortization period.

3. This case is very narrow in its holding and will not cause, encourage, or compel a vast increase in the number of routine zoning and land use cases which are ripe for immediate litigation.

4. The lower court properly decided the length of the appropriate statute of limitations and there is no conflict between any circuits on this question.

5. Petitioner had no First Amendment claim. The First Amendment issues relating to billboard regulation have been decided in *Major Media, supra*, and a long line of other cases. Even had no statute of limitations been applicable the court could properly decide for the City on the merits by summary

judgment, according to the doctrine of *stare decisis.*

As Justice O'Conner noted in her opinion in *Yee*, the Court has the capacity to decide only a small fraction of the cases presented to it through the certiorari process and therefore, the Court must grant certiorari only in those cases that will allow the Court to resolve particularly important cases. This is not such a case and the Respondent respectfully urges the Court to deny the relief sought by this petitioner.

This the 24th day of April, 1992.

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No. 91-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL ADVERTISING COMPANY,
Petitioner

vs.

CITY OF RALEIGH, NORTH CAROLINA,
Respondent

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

Brief Of Defenders Property Rights Joined By Citizens For Constitutional Property Rights, Environmental Conservation Oganization, Fairness To Land Owners Committee, Land Improvement Contractors Association, North Carolina Land-owners Association, Outdoor Advertising Association Of America, Inc., Property Rights as *Amici Curiae* Alliance And Virginians For Property Rights In Support Of Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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Question Presented

1. Whether it is constitutionally permissible for a claim for just compensation which is based on the Fifth Amendment of the United States Constitution to be extinguished by a state statutory time limitation?

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Interests of *Amici Curiae*

Amici Curiae **Defenders of Property Rights** is a not-for-profit public interest law foundation whose members are property owners and other beneficiaries of the rights protected by traditional Anglo-American property law. Incorporated under the laws of the District of Columbia, Defenders of Property Rights is designed specifically for the purpose of participating in legal action affecting the public interest and the private property rights of its membership. Defenders of Property Rights engages in litigation around the nation on behalf of its membership in defense of property interests protected against government incursion by the Bill of Rights. Defenders of Property Rights has devoted a significant portion of its resources to the litigation of regulatory takings issues.

Citizens for Constitutional Property Rights is a Florida-based state-wide group which has as its mission the goal of securing strong private property rights guaranteed by the Bill of Rights. This organization is active with respect to public advocacy and awareness of governmental programs and regulations which have the effect of eroding private property in violation of the Constitution.

The **Environmental Conservation Organization (ECO)** is a national organization of landowners and landowner associations working to balance environmental protection with economic vitality premised on vigorous constitutionally-protected property rights. Currently there are close to 7 million individuals affiliated with ECO.

The **Fairness to Land Owners Committee (FLOC)** is a national organization with over 9,000 members in 32 states. FLOC is dedicated to the preservation of constitutionally-protected private property rights, including the right to use private property prudently. FLOC is dedicated to the advocacy for and the education of the principles of conservation versus confiscation of private property without just compensation.

The **Land Improvement Contractors Association** is a 40-year old organization of building and construction contractors whose industry is dramatically affected by zoning and land use regulations. The Association has been active at the local and national levels on behalf of its members in opposing unnecessary and excessively burdensome restrictions upon the use of private property.

The **North Carolina Landowners Association** is a North Carolina based organization representing up to 150,000 individuals whose private property rights will be directly affected by the outcome of this case. The NCLA was founded to inform and educate private property owners about governmental regulations that unconstitutionally restrict private property rights in North Carolina.

The **Outdoor Advertising Association of America, Inc. (OAAA)** is a national organization comprised of billboard and outdoor sign owners. Outdoor advertising is pervasively regulated through the zoning process and by other mechanisms at the national, state and local levels. These regulations are often confiscatory and bear scrutiny under the just compensation clause of the Fifth Amendment. Members of OAAA are currently involved in at least five cases in federal courts with issues similar to the issues raised in this case. OAAA has been active for many years in the courts, before Congress and in state legislatures in defense of the property rights of its members.

The **Property Rights Alliance** ia a Washington state-wide organization working to bring constitutionally-protected private property rights into the equation of land use regulations.

Virginians for Property Rights is a Virginia-based statewide organization comprised of grassroots property rights groups and individuals who are interested in the protection and preservation of constitutionally-protected private property rights. Their mission is to (1) educate the public regarding private property rights issues; (2) assist others in participating

in the legislative proces regarding property rights issues; and (3) participate in litigation on behalf of their membership in cases involving important property rights issues.

No. 91 - __.

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Petition for Writ of Certiorari
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Statement of the Case

Amici adopts the Statement of the Case as presented by the Petitioner, the National Advertising Company.

Summary of Argument

The just compensation clause contained in the Fifth Amendment to the United States Constitution provides a direct right of action. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) and *Jacobs v. United States*, 290 U.S. 13 (1933). The Petitioner in this case filed a takings challenge to a city ordinance which it alleges took its private property in violation of the just compensation clause of the Fifth Amendment . The Petitioner sought relief for this alleged unconstitutional taking under the Civil Rights Act, 42 U.S.C. § 1983, and directly under the Fifth

Amendment. Both the district court and the Fourth Circuit Court of Appeals mistakenly treated the Fifth Amendment claim as a cause of action brought solely under § 1983. The courts therefore applied what they considered to an appropriate statute of limitations, namely a three- year period applicable to causes of action based upon "a liability created by statute." N.C.G.S. 1-52 (2). The First Amendment cause of action was not considered to be subject to the same statute of limitations, however, as the Fourth Circuit concluded that "an ordinance facially offensive to the First Amendment can[not] be insulated from challenge by a statutory limitations period." Petitioner's Appendix A-16.

This case offers an opportunity for this Court to determine whether the Fourth Circuit' s reasoning with respect to the First Amendment is applicable to the Fifth Amendment. There is, of course, nothing in the language of the just compensation clause itself which justifies any limitation on that right whatsoever. Moreover, in *Jacobs v. United States, supra,* this Court held that the right of action under the Fifth Amendment was not based on statute and could not therefore be qualified by statute.

This case raises the issue of whether a cause of action which is based on the Fifth Amendment and which depends upon no statutory authorization as its basis can be extinguished by a legislatively-created time bar. It furthermore presents the question that if the Constitution does permit such a limitation on the express constitutional right, what is the appropriate limitations period.

I. THIS CASE PRESENTS AN OPPORTUNITY FOR THE COURT TO DETERMINE WHAT, IF ANY, STATUTE OF LIMITATIONS APPLIES TO THE FIFTH AMENDMENT RIGHT TO JUST COMPENSATION FOR PROPERTY WHICH HAS BEEN TAKEN

This Court has never addressed the issue of whether claims for just compensation brought directly under the Fifth Amendment of the United States Constitution can be time-barred or if so, the appropriate statute of limitations.[1] This case affords that opportunity. It is the position of the *amici* that the government should not be allowed to avoid its constitutional obligation to pay just compensation for property which it has taken simply by placing a time limit upon the enforcement of that obligation. Nor should it be able to extinguish the right altogether by enacting a statute of limitations so short as to be meaningless.

The claim for just compensation in this case arises out of a challenge to a city ordinance that forces the removal of the 36 advertising billboards owned by the Petitioner. The Petitioner here asserts that the ordinance in question takes its property for public use and therefore that the Fifth Amendment of the United States Constitution requires that just compensation be paid. However, because the claim for compensation was characterized solely as an action under 42 U.S.C. § 1983, both the federal district court and the Fourth Circuit Court of Appeals held that the Fifth Amendment claim for just compensation was time-barred pursuant to North Carolina's three-year statute of limitations which applies to actions based upon "a liability

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[1] Certainly some challenges for just compensation can be subject to a statute of limitations. For example, under 28 U.S.C. § 2501, the Tucker Act sets a six-year statute of limitations for actions brought in the United States Claims Court for monetary claims against the United States government. A Tucker Act claim, however, is a statutory cause of action and is not founded directly on the Constitution.

created by statute." G.S.N.C. 1 - 52 (2), Petitioner' s Appendix C-4. The Fourth Circuit recognized the unacceptability of this analysis in the context of the First Amendment's claim and accordingly held that the petitioner's First Amendment cause of action was not time barred because "an ordinance facially offensive to the First Amendment can[not] be insulated from challenge by a statutory limitations period . . ." Petitioner's Appendix A-16.

While the Fourth Circuit may well be correct that the First Amendment should not be subject to a statutory limitations period, there is no decision by this Court which holds that a Fifth Amendment claim for just compensation brought directly under the Constitution should not also be exempt from a state statutory limitations period. This is particularly true where, as was the case here, the limitations period applied was for statutory causes of action.

There is, of course, no basis in the Fifth Amendment for holding that just compensation claims can be extinguished by a legislatively-created time bar. The Fifth Amendment of the United States Constitution contains no limitation or exception for its guarantee that when private property rights are taken for public use, just compensation must be paid to the owner:[2]

"[N]or shall private property be taken for public use, without just compensation." U.S.CONST. amend. V.

The obligation for just compensation simply attaches whenever government action works a taking of private property rights. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This constitutional obligation is so evident that this Court has held that an aggrieved property owner need not look to a statute or other legislative authorization in order to obtain the remedy of

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[2] The just compensation clause contained in the Fifth Amendment is the only constitutional provision providing a monetary remedy. In this sense, it is unique.

just compensation to which he is entitled. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *United States v. Clarke*, 445 U.S. 253, 257 (1980) As Justice Brennan articulately explained in his dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981): "This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a 'taking,' compensation *must* be awarded." *Id.* at 654. Justice Brennan concluded his opinion with the further observation that "the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches." *Id.* at 661 .

The most powerful analysis of the Fifth Amendment guarantee that an individuals's rights are protected from confiscation by the sovereign is contained in *Jacobs v. United States*, 290 U.S. 13 (1933). In *Jacobs*, the Court reviewed the constitutionality of a lower court's decision which held that interest was not recoverable on a property owner's claim for just compensation because the statute under which suit was brought did not authorize the payment of interest. The *Jacobs* Court rejected the lower court's conclusion that one's constitutional right to just compensation could be limited by statute:

> "This ruling cannot be sustained. The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution.... The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary.... The suits were ... founded upon the Constitution of the United States. The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive

> and includes all elements, 'and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produced the full equivalent of that value paid contemporaneously with the taking.'"

Id. at 16-17 (citations omitted).

The *Jacobs* Court realized that to fulfill the constitutional promise of just compensation that right cannot be taken away or qualified by statutory whim. The *Jacobs* decision gives credence to the this constitutional guarantee considered essential "in a free government" wherein "almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." Story, J., *Commentary on the Constitution of the United States*, para. 1790 (1833).

This Court has in other contexts similarly rejected attempts to limit the right of just compensation contained in the Fifth Amendment. In *First English*, this Court flatly rejected the government's contention that the just compensation clause serves only as a limitation on the power of government to act and is not of itself a remedial provision: "The cases cited in the text, we think, refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government. Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.'" *Id.* at 316, n.9.

Also in *First English*, this Court overruled the California Supreme Court's prior line of holdings that disallowed damages prior to the actual invalidation of a challenged regulation. The Court reasoned much as did the Court in *Jacobs*, that denying an owner compensation for all those years in which he held the

property but was denied its full use would be a constitutionally-insufficient remedy:

> "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."

Id. at 321.

Given the explicit nature of the just compensation clause itself and the long history of this Court's decisions which have maintained its vitality against attempts to limit it by governmental legislation or acts, it would seem anomalous to conclude that a cause of action can be extinguished on the basis of a statutory time limitation. This is not to say that statutes of limitations do not serve valid procedural interests in other contexts. Where the cause of action is created by statute, *e.g.*, 42 U.S.C. § 1983 (see, *e.g, Board of Regents v. Tomanio,* 446 U.S. 478 (1980)), or in instances involving a waiver of sovereign immunity, 28 U.S.C. § 2501 (six-year statute of limitations for actions brought against the United States government for claims of just compensation set forth in the Tucker Act)(see *Soriano v. United States,* 352 U.S. 270 (1957)) prudential concerns of screening out stale claims and putting a limit upon how long a defendant may be subject to a claim are legitimate. However, when a claim is based directly on an express provision of the Constitution, such limitations can only be viewed as substantive in effect because they extinguish both the right and the remedy for claims of just compensation.

Alternatively, if this Court were to conclude that a time bar is constitutionally permissible, this case also affords the opportunity to address the issue of what period of limitation should apply. Because the claims in this case were treated as being brought solely under 42 U.S.C. § 1983, the courts below used a state limitations period, namely a three-year limitation period

pursuant to G.S.N.C. 1-52 (2), the time limitation applicable to actions based upon "a liability created by statute." Petitioner's Appendix C-4. However, where a claim for just compensation is based directly on the Constitution and not any state statutory provision, the more apposite statute of limitations may be the six-year statute of limitations contained in the Tucker Act, 28 U.C.C. § 2501. The one thing that is clear is that the appropriate limitations period is not one based on state statutory causes of action. Moreover, since causes of action based on a Bill of Rights apply uniformly to protect all citizens, it would be an anathema to allow different states to qualify this federal constitutional right by limiting it differently through state legislation. Indeed, since claims for just compensation are always against the same defendant, *i.e.*, the government, a statute of limitations, if any, should be uniform.[3]

CONCLUSION

Since the question of the appropriate statute of limitations has never before been decided by this Court, and since it is an issue critical to Fifth Amendment litigation, this Court should therefore grant *certiorari* to review this important issue.

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[3] In contrast, Section 1983 causes of actions may be brought against individuals and considerations as to them may be different from those applying to the government.

(4)

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PETITION FOR WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

If Raleigh is serious about the arguments which appear in its Brief in Opposition, then Raleigh is litigating a different case than this one.

First. In a purported effort to correct "misstatements of fact," Raleigh asserts that the issues presented by National Advertising Company "do not fairly represent the *factual findings* of the lower court." (Opp. ii; emphasis added.) Later in the brief, Raleigh amplifies that thought by noting that "[w]hat Petitioner disagrees with is *the court of appeals' findings of fact* [*sic*] . . . ." (Opp. 12; emphasis added.)

Raleigh is right about one thing: National vehemently "disagrees with . . . the court of appeals' findings of fact . . . ." The Court of Appeals had no business making

"findings of fact." Indeed, because this case never went to trial, and was decided on a motion for summary judgment, *no court* made any actual findings of fact. Nonetheless, the Court of Appeals acted as though central "facts" had been proved and were not subject to dispute.

That usurpation of the function of a trial level finder of fact is one of the complaints that National has about the Court of Appeals' decision.

Second. A second supposed "misstatement of fact" was whether Raleigh told National to remove *all* of its signs, including those on federal highways. Raleigh suggests not. (Opp. ii) Whether Raleigh now likes it or not, the letter it sent to National, as alleged in the complaint, described and identified *each* of National's signs (including those on federal highways) and demanded their removal.

Third. Raleigh says that the case law on "ripeness" is clear and there is no confusion which would benefit from this Court's ministrations. (Opp. 4)

If Raleigh believes that, it is both fortunate and lonely. No one else believes it.

- The lower courts, which struggle daily with the manifold permutations of the "ripeness" rules, and have termed them "harsh," "counterintuitive," and "oxymoronic" don't believe it.[1]
- The commentators who see courts groping for answers but failing to

---

[1] *Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1199 (N.D. Cal. 1988).

come up with any "predictable approach" don't believe it.[2]

- The 94% of property owners who see their suits dismissed because they are held to be premature and unripe don't believe it.[3]
- Those who repeatedly beseech this Court for further guidance don't believe it.[4]

The opinion below has the potential for further destabilizing this field of the law by approving (indeed, demanding) action which this Court and all others have rejected: filing suit to challenge a land use regulation *as soon as* the regulation is adopted and *before* the regulation inflicts objective harm. If that is the scenario this Court desires, then that message should come from this Court directly, as it is contrary to the message this Court has consistently given that suit must await patient ripening. (*Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264, 293-297 [1981]; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 494-495 [1987]; *Pennell v. City of San Jose*, 485 U.S. 1, 10 [1988])

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[2] Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zoning & Planning Law Report 49, 53 (July-Aug. 1988).

[3] The statistical analysis is contained in Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Prop. L. J. 73, 91 (1988).

[4] Illustrative is the Petition for Writ of Certiorari now pending in *Long Beach Equities, Inc. v. County of Ventura*, no. 91-1076.

I.

IT IS NO PRECEDENT THAT OTHER PROPERTY OWNERS HAVE LITIGATED PREMATURELY

Raleigh tries to divert attention from the legal issue before this Court by asserting that the case must have been ripe when the ordinance was adopted because other property owners have sued shortly after the adoption of regulations and courts in those cases did not hold that the cases were premature. (Opp. 4)

Each part of this analysis is faulty.

First. The fact that property owners filed suit is obviously of no legal moment. (It is hardly revealed wisdom that anyone with a typewriter and a filing fee can "file" suit.) Property owners understandably get upset when ordinances or regulations that *might* affect them are enacted, whether immediately or in the future. Often, they sue immediately. That is what three groups of property owners did in this Court's most extensive ripeness decisions: *Pennell*, *Keystone*, and *Virginia Surface Mining*. In each case, this Court held that the property owner had jumped the gun and sued prematurely. Other cases in which property owners have been held to have sued before their cases had ripened are legion. The fact that courthouse steps are littered with the remains of prematurely litigating property owners proves nothing.

Second. The fact that some courts (in fact, as Blaesser points out [2 Hofstra Prop. L. J. at 91], a small minority) have entertained suits is likewise of no moment *unless* those courts considered the ripeness issue and held that the cases were ripe. The elementary precept that a decision is authority only for issues raised and decided needs no citation of authority. Thus, the

cases cited by Raleigh which supposedly prove that billboard "amortization" ordinances have repeatedly been "found" ripe for litigation immediately after adoption (Opp. 4) are irrelevant here. In *none* of those cases was the ripeness issue litigated. For whatever reason, the government entities and courts were content to litigate the merits without raising the ripeness issue.

Thus, the vehicle which Raleigh has constructed to carry its argument is incapable of bearing its intended legal freight. Neither the actions of those property owners with a tendency to lunge toward the courthouse at the first hint of a regulatory disagreement nor those courts that have dealt with the merits of some cases *without discussing or deciding whether the cases were ripe or not*, can determine the outcome here. This case will stand or fall on its own merits.

II.

HYPOTHETICAL INJURY CANNOT GIVE RISE TO A CAUSE OF ACTION

Raleigh has tried to paint the decision below as a narrow one, tailored to the facts of this case, which can have no broad impact. (Opp. 2-3)

Wrong.

Raleigh's analysis is tied to the "findings of fact" which Raleigh believes the Court of Appeals made in this case. (Opp. ii, 12) It is only by *assuming* that damage instantly occurred (as the Court of Appeals did, *without evidence*, in this appeal from a summary judgment) that one can conclude that the statute of limitations either started to run or expired.

To justify its conclusion, the Court of Appeals **hypothesized** that, on the date the Raleigh ordinance was enacted, it reduced the value of National's property and made that property less attractive to prospective purchasers. (App. A, p. 8) This hypethesis is the fulcrum on which the Court of Appeals' statute of limitations analysis rests. There are *two fundamental errors* in that hypethesis, both discussed in the Petition for Writ of Certiorari and both ignored by Raleigh:

- *First.* This Court has expressly held that merely reducing the value of property and making property less attractive to potential purchasers does *not* state a claim for a taking. (*Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 131 [1978]; *Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 15 [1984])

  Using economic analysis to find a taking requires a *deprivation of all economically viable use.* (*Agins v. City of Tiburon*, 447 U.S. 255, 260 [1980]) Plainly, that did not occur here when the ordinance was adopted.

- *Second.* The analysis this Court requires in regulatory taking cases is NOT the analysis used by people in the real estate market. In the real world of buyers and sellers, all regulatory enactments are immediately factored into the price a piece of property can command. For example, when a city re-zones vacant land from its former availability for a high-rise office building to make it useable only

for a single family residence with a large yard, buyers in the market would react and offer less to purchase the property. However, until someone actually attempted to develop the property and could prove that this Court's multi-pronged test for a taking had been met, no cause of action would exist.[5]

If not reversed by this Court, the analysis of the Court of Appeals would justify — and probably require — the filing of suit in *all* regulatory impact cases immediately. The risk of waiting to "ripen" the situation — *i.e.*, dismissal of suit, as National suffered here — is too great.

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[5] Raleigh's conclusory assertion that "a cause of action arose" when the ordinance changed the status of the signs (Opp., p. 14) begs the question and ignores the Court of Appeals' opinion. The Court of Appeals repeatedly *refused* to conclude that a cause of action *for a taking* had arisen in 1983 or at all. (App. A, pp. 6, fn. 3, 8) Even if Raleigh were correct, and *some* cause of action arose in 1983, the issue here is whether a cause of action *for a taking* arose then so that the statute of limitations for that *specific* cause of action could have run. Raleigh's assertion provides no analysis and no answer.

III.

SOME CONSTITUTIONAL RIGHTS ARE NOT "BETTER" THAN OTHERS

Plainly, the Court of Appeals treated a challenge on First Amendment grounds differently from a challenge on Fifth Amendment grounds for statute of limitations purposes. And when it applied the statute of limitations to the Fifth Amendment challenge, the Court of Appeals deliberately created conflict with the 9th Circuit Court of Appeals on what limitation period to apply.

Raleigh's attempted defense of the Court of Appeals won't wash.

First. Raleigh asserts that the Court of Appeals didn't *hold* that no limitation period applies to a First Amendment challenge. (Opp., p. 6)

Wrong.

However one wants to characterize it, the Court of Appeals dealt with the *merits* of the First Amendment challenge and expressly refused to consider it barred by the passage of time. (App. A, p. 16) If it had applied the statute of limitations (as the District Court did), it could not have reached the merits.

Second. Raleigh then asserts that, even if the Court of Appeals treated the First and Fifth Amendments differently, that's OK, because the First Amendment "has always enjoyed a high position in [the] hierarchy . . . ." (Opp., p. 6)

"High" it may be, and deservedly so, but the protection of the rights of property owners against State action is linked in the Fourteenth Amendment with the rights to life and liberty. (*See also Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 [1972].) Trying to "rank"

constitutionally protected rights would seem to be a futile exercise. The issue here is whether violation of the Constitution can be validated by the mere passage of time. And, if so, whether some parts of the Constitution are immune from that sanction. No good reason has been presented for the distinction.

Third. Raleigh asserts that there are no causes of action directly under the Constitution. In Raleigh's words, ". . . *the Constitution* tells us how to compensate for a taking, it *does not* conceal a separate grant of jurisdiction or *create a separate cause of action* outside of some statutory scheme for enforcement." (Opp., p. 8; emphasis added.)

Wrong again.

As this Court recently expressed it:

> "We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of ' "the *self-executing* character of the constitutional provision with respect to compensation . . . ." ' [Citations.] . . . . [I]t has been established at least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are *grounded in the Constitution* itself . . . ." (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 [1987]; emphasis added.)

Whether a statute of limitations can apply to constitutional violations at all and, if so, which statute, are questions which are confused, rather than answered by the decision below. Without this Court's intervention, that confusion will surely multiply.

CONCLUSION

Notwithstanding Raleigh's comfort level with the existing legal situation, the law of "ripeness" in regulatory taking cases is chaotic. The number of Petitions which this Court examines which raise that issue are testimony to the breadth of the problem.

Perhaps this Court thought it had provided sufficient guidance in *Virginia Surface Mining*, *Keystone*, and *Pennell*. Decisions like the one below demonstrate that confusion continues to reign. The lower courts will flounder and create additional conflict and confusion until this Court acts.

National Advertising Company prays that this Court's writ issue so that rationality can be brought to this area of the law and the time of courts and litigants can be spent evaluating the merits of their cases.

Respectfully submitted,

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